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**THE EFFECT OF WAR  
ON CONTRACTS**

TO  
MY WIFE

# THE EFFECT OF WAR ON CONTRACTS

ST. 571-78

VERIT  
JUNE, 72

BY

GEORGE J. WEBBER, LL.D.

OF THE MIDDLE TEMPLE  
AND THE NORTHERN CIRCUIT  
BARRISTER-AT-LAW



SECOND EDITION

WITH A FOREWORD BY  
THE RT. HON. SIR DAVID MAXWELL FYFE,  
K.C., M.P.  
SOMETIME H.M. ATTORNEY-GENERAL

LONDON  
THE SOLICITORS' LAW STATIONERY SOCIETY, LTD  
88-90 CHANCERY LANE, W.C.2

1946

THE SOLICITORS'  
LAW STATIONERY SOCIETY, LTD

LONDON

22 Chancery Lane, W C 2  
3 Old Jewry, E C 2  
6 Victoria Street, S.W 1  
49 Bedford Row, W C 1  
15 Hanover Street, W 1

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55-59 Newhall Street

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19-21 North John Street

MANCHESTER

5 St James's Square

GLASGOW

157 Hope Street

*First Edition*                      *August, 1940*  
*Second Edition*                  *January, 1941*

MADE AND PRINTED IN GREAT BRITAIN BY  
THE SOLICITORS' LAW STATIONERY SOCIETY LIMITED  
41 THEIR WORKS  
FLAXMAN TERRACE DUKES ROAD, W C 1



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## FOREWORD TO THE SECOND EDITION.

BY

THE RT. HON. SIR DAVID MAXWELL FYFE, K.C., M.P.  
SOME TIME H.M. ATTORNEY-GENERAL

IT gives me great pleasure to write a foreword to this book for more reasons than one, but mainly because it deals comprehensively with a most interesting and important subject of which, as a Law Officer for over three years of war, I may be allowed to say *pars minima fui*. Moreover, although I have often had the pleasure of returning to my own university and hearing judgments of the highest tribunals disposed of by an appropriate epigram, I have always had a suspicion that if one could only force an extra day into the week to be spent in wider legal reading and in search of objectivity, the most practical aspects of one's own advice and advocacy would vastly improve. Mr. Webber's guiding principles, namely, comprehensive treatment, the eliciting of the judicial process in reaching the important decisions and a worthy presentation of the relevant academic literature, provide for this subject at least that combination of benefits for which the practitioner often sighs.

The book is in four parts closely classified, dealing with: Enemy Character; Commercial Contracts; Frustration of Contract; Effects of Frustration.

The first of the three distinguishing characteristics which I have mentioned, namely, the extensive interpretation and treatment of the subject, is exemplified in Part One which does not plunge straight into *Enemy Character*, or deal with war *in vacuo*. It answers questions on which, in these days of change, it is still most valuable to have the relevant facts. Who were His Majesty's enemies? What were the powers of the Governments in exile? Who were the main members of the alliance of the United Nations whose Charter will become the basis of international relations?

Mr. Webber passes to the War-time Emergency Powers and their effects on contracts. He discusses the "unparalleled plenitude of their language" and examines the discretion of the executive in this war and the last; the *Liversidge* doctrine; the limitation of *ultra vires*.

*Enemy Character* is next investigated, and the principles now settled by the House of Lords in the *Sovfracht Case* [1943] A.C. 203, 211, 212, and summarised by Lord Simon.

There follows an exhaustive analysis of the *Procedural Capacity of Alien Enemy* and an acute inquiry into the operation of



**Statutes of Limitations.** Mr. Webber's view that the statute, once it had begun to run, was not suspended, is confirmed by the Limitation (Enemies and War Prisoners) Act, 1945, which is made retrospective to 3rd September, 1939, and which Mr. Webber sets out, with notes, in an Appendix.

Mr. Webber, in *Part Two*, considers the effect of war on *nine commercial contracts*. Three streams converge to form the present law: decisions in the Napoleonic war: decisions in the War of 1914–1918, and decisions in the present war. The progress of their flow is clearly marked in Mr. Webber's narrative. Of particular value to practitioners will be the chapters dealing with *sale of goods*, *insurance of property*—lucidly explaining the cases upon war risks and perils of the seas—and *contract of service*, which sets out judicial interpretation of the Essential Work Order, and the law of Reinstatement as expounded by the Umpire.

The second half of the book—*Parts three and four*—dealing with *Frustration* and its *Effects*—passes beyond the marshalling of the decisions and examines foundations of doctrine. No more comprehensive examination can be found, collating and comparing judicial dicta, views of two important legal committees, criticisms of distinguished jurists, Williston's exposition, the American Restatement of Law of Contracts. Mr. Webber rejects the orthodox theory of the “implied condition” and accepts the view of Lord Wright (whose judgments and essays Mr. Webber has obviously most closely examined), saying: “The time has come to shed the fiction of ‘implied contract’ and to regard the doctrine as *a mode by which upon the facts of a case, the court itself does justice in circumstances for which the parties never provided.*” All reported decisions arising out of the two wars are clearly, chronologically and completely set out: in one chapter, those decisions in which the court held, on the facts, that the contract was frustrated; in another chapter, those in which the court declined so to hold.

*Part Four*, dealing with the *Effects of Frustration*, will be most valuable to practitioners. It collates and sets out, as no other book has yet done, in 100 pages and eight chapters, the new principles: their origins, from the *Coronation* cases to the *Cantiare Case* [1924] A.C. 226; Recommendations of Law Revision Committee: The *Fibrosa Case* [1943] A.C. 32; an inquiry into the nature of a quasi-contract; and, finally, the Law Reform (Frustrated Contracts) Act, 1943—quasi-contract originating in statute—with short commentary.

Mr. Webber is not content with merely stating the law as he finds it in the cases. As I have said, the second distinguishing characteristic of this work is that he elicits and exhibits the judicial process in reaching the decision; the arguments on both sides are frequently given; the hesitations of the judges:

their reasoning; copious citations follow from the judgments with a small anthology of selections from speeches in leading cases, e.g., in particular, speeches of Viscount Simon, L.C., and Lord Wright in the *Denny Mott Case* [1944] A.C. 265, and in the *Cricklewood Case* (1945), 61 T.L.R. 202.

Two decisions have a chapter each, in which all the speeches are carefully analysed: The *Constantine Case* [1942] A.C. 154, and the *Fibrosa Case* [1943] A.C. 32; the latter, apart from the *Sovfracht* decision [1943] A.C. 203, is perhaps the most important case of the war.

Finally, although this is essentially a practitioner's book, Mr. Webber has done what is rare in such a book: on all the problems he has brought to bear all the relevant academic literature—English and American—that he could find. In addition to copious references to Williston's *Law of Contracts* and the American *Restatement of Contracts*, he cites a selected number of leading decisions of the United States Supreme Court and of the New York Courts, which must be helpful—as practitioners will find—in the Court of Appeal and the House of Lords. Such judgments as those of Mr. Justice Black in *Ex parte Kawato* (1942), 317 U.S. 69, upon enemy character, or of Chief Justice Stone in *Ex parte Quirin* (1942), 317 U.S.1, upon the status of a spy, or the great dissent of Marshall, C.J., in *The Venus* (1814), 8 Cranch Reports 253, upon the duration of commercial domicile, will be found both illuminating and of value.

Such references will enhance the value of this work here and abroad, and exhibit the unity, in essential principle, of the common law in its homes old and new. Though forms may differ, justice is one; in the quest for justice, professor, practitioner and judge co-operate.

I hope that I have said enough to indicate something of the extent and value of this book, and also to pay my tribute to the industry, learning and enthusiasm for the law of an old Northern Circuit friend.

D. P. MAXWELL FYFE

August, 1945.

## PREFACE TO THE SECOND EDITION

**T**HE *Second Edition* of *Effect of War on Contracts* is three times as large as the *First*. Three long years of exacting labour have been spent in the writing; during two of these, official duties claimed the greater part of time and energy. One third of the book is entirely new: a new presentation of matters, old and new. Of the rest, vast portions have been augmented or recast, or entirely rewritten. Although hostilities have ended, the legal problems arising out of the war will take several years to solve. In that task this book may act as guide: upon this exposition of the law I have sought to shed the light of legal reason. Searching all the libraries available, I have excluded nothing I could lay hands upon that appeared to have any bearing—decisions in America and the Dominions, articles and essays of legal writers, reports of parliamentary debates (to show the historical setting).

The first two chapters are entirely new. For, perhaps, a quinquennial, Emergency Powers, modified yet extended—"of Olympian stature" (to use Dr. Allen's felicitous phrase)—are for a new purpose to stay with us. Soon the legislation against trading with the enemy will cease to be a part of law in daily life; whether a given transaction once infringed the law may still be material. The chapter on "Insurance of Property" has grown considerably with judicial elucidation of "proximate cause." On this subject, *The Corwold* [1942] A.C. 691, 706, long likely to be the leading case, illuminates—in the words of Lord Wright—the principle that "Causation is to be understood as the man in the street, and not as either the scientist or the metaphysician, would understand it." *The Minden* [1942] A.C. 50 is a monograph upon "frustration of voyage," the constituents of a marine policy on goods, and the concept of constructive total loss. "Contract of Service" has been completely recast. In the transition from war to peace the technique of the Essential Work Order—that powerful instrument of emergency which held essential workers in command—will remain the archetype. The safeguard against administrative mistake is the local appeal board, a quasi-judicial body whose recommendation—despite the recent strictures of Dr. Allen—must be considered before the National Service Officer makes his decision. The Reinstatement in Civil Employment Act, 1944, is bound to be of paramount importance to innumerable men and women returning from the armed forces or the women's services.

Upon Frustration of Contract—the term now recognised by the House of Lords and by the Legislature—the war has produced a trilogy of great decisions. *The Constantine Case* [1942] A.C. 154, 174 laid down the rules of onus of proof where

frustration is pleaded: in Viscount Maugham's words, a question "essentially one of common sense as related to justice." In the *First Edition*, a different rule was submitted; it has been well pointed out that the law as declared by the House is really a new rule—not of logic, but of policy. Lord Wright, in *The Denny Mott Case* [1944] A.C. 265, 274, 275 expounds in the clearest and most significant language his "heretical" theory of frustration. The theory of the "implied term" does not explain *why* the term is implied; the result does not depend upon what the parties would or might have agreed. "The court has formulated the doctrine by virtue of its inherent jurisdiction . . . The doctrine is invented by the court in order to supplement the defects of the actual contract . . . the court decides the issue and decides it *ex post facto* on the actual circumstances of the case." The last of the trilogy—*The Cricklewood Case* [1945] A.C. 221—is the most remarkable: first, for the comprehensive definition of frustration promulgated by Viscount Simon, L.C.; and secondly, for the difference of judicial opinion in the highest, upon the question whether a lease may be determined by frustration. The question remains—and with it, Lord Wright's observation upon the doctrine: that it is "modern and flexible and is not subject to being constricted by an arbitrary formula."

In Part IV of the book the effects of frustration are considered. Boldly has *The Fibrosa Case* [1943] A.C. 32, 61 rolled away the reproach of *Chandler v. Webster* [1904] 1 K.B. 493. It has far greater significance. Lord Wright—protagonist of progress in the law—rejecting Lord Sumner's dicta in *Sinclair v. Brougham* [1914] A.C. 398, 452, and aligning himself with the statement of Lord Mansfield in *Moses v. Macferlan* (1760), 2 Burr. 1005, 1008, 1012, has fearlessly sought to find inherent in a third category of the common law, called quasi-contract or restitution, a theory of "unjust enrichment." The twenty-fifth chapter is an inquiry into the nature of quasi-contract. "Quasi-contract" deals with *obligations to pay* imposed upon the parties by the court or the Legislature. (That *frustration* belongs to the province of quasi-contract—a view proposed in the Preface to the *First Edition*, I now withdraw.) Lord Mansfield's obligation "in natural justice" had not escaped Lord Sumner's caustic criticism or the juristic analysis of Holdsworth who held immovably to the "contract implied by law." But it seems clear from *United Australia v. Barclays Bank* [1941] A.C. 1 (and other recent decisions), that—as Lord Wright has recently observed—"quasi-contract has shed the embarrassments of the implied contract and can be stated as a logical and simple theory for doing justice in cases of unjust enrichment." "The obligation is imposed by the court"—he judicially declares—"simply under the circumstances of the case on what the

court decides is just and reasonable, having regard to the relationship of the parties. It is a debt or obligation constituted by the act of the law, apart from any consent or intention of the parties or any privity of contract."

This obligation to restore an "unjust benefit," the House of Lords—by the unanimity of their *obiter dicta* in *The Fibrosa Case*—declined to impose where the consideration had only *partially* failed; judicial valour judicially legislating, unfortunately could not reach so far. On the initiative of Viscount Simon (then Lord Chancellor) the Legislature intervened. Where a contract is frustrated on or after 1st July, 1943, the effects of frustration are henceforth governed by statute. The labours of the Law Revision Committee led, after four years' delay, to the Law Reform (Frustrated Contracts) Act, 1943, which provides "an equitable apportionment of prepaid moneys." A short commentary on the statute, followed by an excursion into the American Law of Restitution concludes the text.

The Appendices primarily deal with events occurring, or decisions given, since the pages were in proof; they bring the law up to 31st August, 1945. The unconditional surrender of Germany in May and of Japan in August, has happily brought hostilities—but not "the war"—to an end. For giving some account, irrelevant though it may appear to be, of *The Charter of The United Nations* I make no apology. It seemed fitting to conclude the book with the *Draft International Rules on Effect of War on Contracts* adopted, part at New York in 1930 and part at Oxford in 1932, but never implemented.

For his gracious foreword I express my profound thanks to the Rt. Hon. Sir David Maxwell Fyfe, K.C., M.P., Sometime His Majesty's Attorney-General. To my friend Major C. J. Galpin, D.S.O., I am most grateful for sound advice and constant encouragement. The hospitality of the Library of Lincoln's Inn—the workshop of this book—whose librarian, Mr. T. Hodgkinson, has always been helpful, was a boon inestimable. My old friend Mr. H. A. C. Sturgess, librarian of Middle Temple Library—may it speedily be rebuilt—generously placed at my disposal without let or hindrance all that was available; I am particularly grateful for being able to use current periodicals from America. For a similar kindness, I thank my friend, Mr. F. Graham Glover, the learned editor of the *Law Times*. To Mr. J. Strong, solicitor of the Supreme Court, my thanks are also due; he read, in page proof, the chapters on "Enemy Character" and "Contracts with the Enemy," and on that subject gave me the benefit of his experience. He further drew my attention to the *Draft International Rules*. For kind permission to reproduce them acknowledgment is made to the Executive Council of the International Law Association.

Among the many books that I consulted one has been of especial value. Dr. Martin Domke's monograph, *Trading with the Enemy in World War II* (New York, 1943), put me on the track of the American and Dominion decisions. Having little or no access to Reports of the State or Dominion Courts, I have based my summaries of those cases upon his careful account, and I here acknowledge my obligation.

Finally, without the patient understanding and the unwearied labour of all those who bore the burden of publication—and, in particular, of Mr. F. J. Holroyde and Mr. P. J. Chance—this edition would never have seen the light. The incendiaries of March, 1944, and the flying bombs of June which razed the publishers' premises to the ground, would have deterred the boldest. I am grateful to the publishers for remaining undeflected by the length of the work and the protracted period of its writing.

The good counsel of my father has greatly helped me through all the toil of this edition: my gratitude to him cannot be measured.

GEORGE J. WEBBER

6 PUMP COURT,

TEMPLE, E.C.4.

10th September, 1945

## FROM THE PREFACE TO THE FIRST EDITION

SHORTLY after the outbreak of war the learned Editor of *The Solicitors' Journal* invited me to contribute a series of articles upon *War and Contracts*. After the series was completed, it occurred to me that a short and swift book was desirable upon the main principles of this branch of the law, illustrated by the leading authorities. A critical examination of the cases however—particularly upon *Frustration of the Adventure*—was a longer and more arduous task, in the event, than at first appeared. Merely to state in a summary form the material propositions without the evidence upon which they were based, seemed, as the book progressed, to be of small value to the practitioner. Accordingly, I have attempted to give a reasoned and systematic exposition of the law, as deduced from earlier, modern and more recent decisions (including certain judgments delivered in the Supreme Court of the United States), and as found in the works of authoritative writers in England and in America . . .

The book is divided into three parts . . . Part I treats of the status of the *alien enemy*; his procedural capacity; and the effect of war upon contracts made with him . . .

In Part II, *Certain Commercial Contracts in War* . . . are examined . . .

Part III, the second half of the book, is devoted to *Frustration of the Adventure*. The doctrine of the dissolution of a contract upon the frustration of the adventure has been based on various grounds which Dr. Arnold D. McNair . . . has recently subjected to a searching examination (*Frustration of Contract by War* (1940), 56 *Law Quarterly Review*, 173–207). Many judges have thought that the contract contains an “implied term” upon which the parties contracted. This view, it is respectfully submitted, is wrong. Lord Sumner . . . recollecting in tranquillity the current of decisions given during the last war, swept away the notion that “frustration” depended upon the intention of the parties, or their opinions, or even knowledge. Frustration . . . is “really a device by which the rules as to absolute contracts are reconciled with a special exception which justice demands”: *Hirji Mulji v. Cheong Yue Steamship Co.* [1926] A.C. 497, 510. And recently, Lord Wright . . . spoke of the “supplementing power” of the court. “The court in the absence of express intention of the parties determines what is just . . . The judge finds in himself the criterion of what is reasonable. The court is in this sense making a contract for the parties though it is almost blasphemy to say so”: *Legal Essays and Addresses* (1939), 258, 259. To found the theory of frustration aright

is fundamental; it is no mere question of nomenclature . . . Upon the correct approach, the correctness of an argument or a decision may depend . . .

An exposition of the judicial bases of frustration—beginning with *Taylor v. Caldwell* (1863), 3 B. & S. 826—is essential in order to understand the decisions arising out of the last war. Those cases in which the court determined, and those cases in which the court declined to determine, that, upon the frustration of the commercial adventure, the contract was dissolved, are considered in separate chapters in order to prevent confusion; each group is presented in chronological order so that the doctrine may be observed progressing from its two-fold origin in the implied condition (properly so-called), and in the frustration of the adventure of a charterparty, towards a general principle applicable to all contracts. . . .

GEORGE J. WEBBER

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24th July, 1910.



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- Corbin, Arthur L. : *Supervening Impossibility of Performing Conditions Precedent* (970-977).

- Parkinson, O. C. : *Excuse of Performance by Existence of Condition causing Unforeseen Expense* (977-979).  
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 Woodward, Frederic C. : *Impossibility of Performance as an Excuse for Breach of Contract* (1901), 1 Columbia L. Rev. 529-541. Selected Readings, 961-969.  
 Wright, Cecil A. : *Review of Webber, Effect of War on Contracts* (1941), 19 Can. Bar Rev. 221-227.  
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 Gordon, D. M. : *Krell v. Henry* (1936), 52 L.Q.R. 324-326.  
 Landon, P. A. : *Krell v. Henry* (1936), 52 L.Q.R. 168-172.

#### ONUS OF PROOF: CONSTANTINE CASE (Chap. XIX)

- Chorley, R. S. T. : *Note* (1911), 5 Mod. L. Rev. 141-142.  
 " P.H.W." : *Note* (1911), 57 L.Q.R. 300, 301.  
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- Walford, E. O. : *Impossibility and Property Law* (1911), 57 L.Q.R. 339-372.  
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#### EFFECTS OF FRUSTRATION

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P. A. Landon, *Note on Brook's Wharf Case* (1937), 53 L.Q.R., 302-304; P. H. Winfield, *ib.*, 447-449; W. Friedmann, *ib.*, 450; "G.R.Y.R." (1938), 54 L.Q.R. 24-25.

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House of Lords: *Official Report*, 29th June, 1943, vol. 128, cols. 135-151; 8th July, 1943, cols. 367-371

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Note: *Effect of Intervening Impossibility upon Contract to Repair Another's Building*. In *Selected Readings*, 1038-1043.

# LIST OF ABBREVIATIONS

A.J.I.L.	..	..	American Journal of International Law.
Annual Digest	..	..	<i>Annual Digest and Reports of Public International Law Cases, Years 1941-1942.</i> Edited by H. Lauterpacht. 1945.
Arnould	..	..	Arnould, Sir John, <i>Marine Insurance</i> , 12th ed., by R. I. Simey and G. R. Mitchison. 1939.
Blum and Rosenbaum			Blum, A., and Rosenbaum, M., <i>The Law relating to Trading with the Enemy</i> . 1940.
B.Y.I.L.	..	..	British Year Book of International Law.
Campbell	..	..	Campbell, H., <i>The Law of War and Contract</i> . 1918.
Can. Bar Rev.	..	..	Canadian Bar Review.
Carver	..	..	Carver, Thomas Gilbert, <i>Carriage of Goods by Sea</i> , 8th ed. by J. S. Henderson and Sanford D. Colo. 1938.
Columbia L. Rev.	..	..	Columbia Law Review.
C.L.R.	..	..	Commonwealth Law Reports.
D.L.R.	..	..	Dominion Law Reports.

Domke .. ..	Domke, Martin, <i>Trading with the Enemy in World War II</i> . New York, 1943.
Farnsworth .. ..	Farnsworth, A., <i>The Residence and Domicil of Corporations</i> . 1939.
Gottschalk .. ..	Gottschalk, Rudolf, <i>Impossibility of Performance in Contract</i> . 1938. 2nd ed. 1945.
Harv. L. Rev. .. ..	Harvard Law Review.
Higgins and Colombos .. ..	Higgins, A. Pearce, and Colombos, C. John, <i>The International Law of the Sea</i> . 1943.
Journ. Comp. Legisl. .. ..	The Journal of Comparative Legislation and International Law.
Krusin and Rogers .. ..	Krusin, S. M., and Rogers, P. H. Thorold, <i>The Solicitors' Handbook of War Legislation</i> , vols. 1-V, 1940-1944. (Vols. III-V, by Maurice Share and S. M. Krusin.)
L.Q.R. .. ..	Law Quarterly Review.
Legal Essays and Addresses .. ..	Wright, The Rt. Hon. Lord, <i>Legal Essays and Addresses</i> . 1939.
Lindley .. ..	Lindley, The Rt. Hon. Lord, <i>A Treatise on the Law of Partnership</i> , 10th ed. by Walter B. Lindley. 1935.
McElroy and Williams .. ..	McElroy, R. G., and Williams, Glanville L., <i>Impossibility of Performance</i> . 1941.
McNair .. ..	McNair, Sir Arnold Duncan, <i>Legal Effects of War</i> , 2nd ed. 1944.
Michigan L. Rev. .. ..	Michigan Law Review.
Mod. L. Rev. .. ..	Modern Law Review.
Oppenheim .. ..	Oppenheim, L., <i>International Law: A Treatise</i> . 2 vols. 5th ed. 1935, 1937; 6th ed. 1945 (vol. II).
Phillipson .. ..	Phillipson, Coleman, <i>Effect of War on Contracts</i> . 1909.
Pitt Cobbett .. ..	Cobbett, Pitt, <i>Cases on International Law</i> . 5th ed. by Wyndham L. Walker. 1937.
Restatement .. ..	American Law Institute, <i>Restatement of the Law of Contracts</i> . 2 vols. 1932.
Scrutton .. ..	Scrutton, Sir Thomas Edward, <i>The Contract of Affreightment as expressed in Charter-parties and Bills of Lading</i> . 11th ed. by W. L. McNair and A. A. Mocatta. 1939.
Selected Readings .. ..	<i>Selected Readings on the Law of Contracts. From American and English Legal Periodicals</i> . New York, 1931.
Trotter .. ..	Trotter, William Finlayson, <i>The Law of Contract during and after War</i> . 4th ed. 1940.
U.S. .. ..	United States. Supreme Court Reports.
Williams .. ..	Williams, Glanville L., <i>The Law Reform (Frustrated Contracts) Act</i> . 1943. 1943.
Williston .. ..	Williston, Samuel, <i>A Treatise on the Law of Contracts</i> . (Revised edition by the Author and George J. Thompson. 1938.) (Vol. 6.)
Winfield .. ..	Winfield, Percy H., <i>The Province of the Law of Tort</i> . 1931.
Yale L.J. .. ..	Yale Law Journal.

## PART I

### WAR; EMERGENCY POWERS; ENEMY CHARACTER

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## CHAPTER I

### WAR: DURATION AND TERMINATION

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## I. WAR

### 1. *Sovereign Declares*

"BY the law and constitution of this country, the sovereign alone has the power of declaring war and peace," said Sir William Scott.<sup>1</sup>

War may exist without a declaration of war, nor is the severance of diplomatic relations essential.

Speaking of a unilateral declaration of war by Sweden in 1812—adopting "the continental system" imposed by Napoleon,

<sup>1</sup> *The Hoop* (1799), 1 C. Rob. 196, 199. See also *Janson v. Driefontein Consolidated Gold Mines, Ltd.* [1902] A.C. 484, 500, *per* Lord Davey, adopting a passage from the judgment of Romer, L.J., in *Driefontein Consolidated Gold Mines, Ltd. v. Janson* [1901] 2 K.B. 419, 439, 440.

For *Decisions of English Courts upon the Occurrence of a State of War*, see McNair, in *Transactions of the Grotius Society*, vol. XI (1924), 46-49.

she had excluded British ships from her ports, and British forces seized the Island of Hanoë—Sir William Scott declared :—

“ . . . war may exist without a declaration on either side . . .

A declaration of war by one country only is not, as has been represented, a mere challenge, to be accepted or refused at pleasure by the other. It proves the existence of actual hostilities on one side at least, and puts the other party also in a state of war.”<sup>1</sup>

## 2. Statement of Foreign Office Binding

The courts will take judicial notice<sup>2</sup> of the existence of a state of war between His Majesty and another country.<sup>3</sup> If the court is in doubt whether His Majesty is at war with a particular country, the proper course is to consult the Foreign Office : its decision is conclusive.<sup>4</sup> “ One State cannot speak with two voices on such a matter, the judiciary saying one thing, the executive another.”<sup>5</sup>

Lord Atkin was dealing with the recognition of the Nationalist Government of Spain ; the reasoning applies to the existence of a state of war. Bucknill, J., had directed a letter to be

<sup>1</sup> *The Eliza Ann* (1813), 1 Dod. 244, 247. See also *Janson's Case*, *ib.*, 493, *per* Lord Halsbury, L.C. And see *A.J.I.L.*, vol. 33 (1939), *Note*, 538-541; McNair, 1-11.

<sup>2</sup> Compare *R. v. De Berenger* (1814), 3 Maule & Selwyn 67, 69, *per* Lord Ellenborough, C.J. : “ There were so many statutes that spoke of a war with France, that it was impossible for the judges not to take judicial notice of it.” *In re a Petition of Right* [1915] 3 K.B. 649, 658, *per* Lord Cozens-Hardy, M.R. : “ The court will take judicial notice that this country is in a state of war, that its coasts have been attacked by Zeppelins and other aircraft and, further, that certain places on the East Coast have been subjected to attack by the enemy's fleet.” See also *per* Lord Wright in *Liversidge v. Anderson* [1942] A.C. 206, 265 : “ Even a judge may be allowed to take notice of the import of words like Fifth Columnists and Quislings, and the like.” But “ the date of a particular event in a modern war, such as an engagement or a withdrawal,” cannot be stated without proof, *per* Viscount Cave, K.C., in *Commonwealth Shipping Representative v. P. & O. Branch Service* [1923] A.C. 191, 197.

Thus also, Lord Sumner (at 211). See his observation on “ judicial notice,” generally : —

“ . . . to require that a judge should affect a cloistered aloofness from facts that every other man in court is fully aware of, and should insist on having proof of what, as a man of the world, he knows already better than any witness can tell him, is a rule that may easily become pedantic and futile. Least of all would it be possible to require this detached and blindfold attitude towards events which the course of the late war has burnt into the memories of us all.”

See Phipson, *Evidence* (1942), 8th ed., 18-19 ; Phillipson, 25-26 ; 2 Pitt Cobbett, 21-25, 23 : McNair, 1.

<sup>3</sup> For the characteristics of war according to International Law, see Oppenheim, *International Law* (1935), 5th ed., ed. Lauterpacht, vol. II, 171-181.

<sup>4</sup> *Kawasaki Kisen Kabushiki of Kobe v. Bantam Steamship Company, Ltd.*, (No. 2) [1939] 2 K.B. 544, 553, *per* Sir Wilfrid Greene, M.R.

<sup>5</sup> *The Arantzazu Mendi* [1939] A.C. 256, 264, 267, 268.

written to the Foreign Secretary—"not only the correct, but the only procedure."<sup>1</sup>

"The court," Lord Wright declared, "is . . . bound without any qualification by the statement of the Foreign Office, which is the organ of His Majesty's Government for this purpose in a matter of this nature. Such a statement is a statement of fact, the contents of which are not open to be discussed by the court on grounds of law."<sup>2</sup>

### 3. "Strained Relations" not War

The mere existence of "strained relations" between governments, does not connote "a state of war."<sup>3</sup> "We are treated very discourteously there," said Lord Ellenborough, of Prussia, "but it is not to be considered an enemy's port. Königsberg belongs to Prussia. We are placed in a strange anomalous situation with regard to that country and others on the Continent; but it is not that of war. We have published no declaration of war against Prussia; we have not issued letters of marque and reprisals; we have not done any act of hostility. Therefore, though the relations of amity are not very strong between us, yet we are not at war with Prussia."<sup>4</sup>

On 2nd October, 1899, war between His Majesty and the South African Republic was imminent. The Republican Government, in contemplation of, and for the purpose of, war seized gold during its transit from Johannesburg to the United

<sup>1</sup> See Mann, *Judiciary and Executive in Foreign Affairs* (1944), 29 Grotius 143.

<sup>2</sup> See *Hagedorn v. Bell* (1813), 1 Maule & Selwyn 450. "It belongs to every State to pronounce upon the continuance either of amity, hostility or neutrality as between itself and any other State," per Lord Ellenborough, C.J.

And see *Guaranty Trust Co. v. United States* (1938), 304 U.S. 126, 137.

See *Bank of Ethiopia v. National Bank of Egypt and Liguori* [1937] Ch. 513, 515, 519, where a certificate from the Foreign Office was put in stating that in December, 1936, the British Government recognised the Italian Government as the *de facto* government of the area of Abyssinia then under Italian control. Clauson, J., held that the previous acts of the Italian Government, in May, 1936, could not be impugned. In May, 1936, the Italian Government purported to annex Abyssinia. The British Government did not recognise the conquest *de jure* until November, 1938. McNair criticises this decision: belligerent occupation is provisional and recognition relates back not to the beginning of such occupation, but to the date when it ceased and merged into *de facto* sovereignty (McNair, 310-343).

Upon the recognition of the insurgent Government of General Franco as the *de facto* government of the area in which Bilbao is situate, see *Banco de Bilbao v. Sancho* [1938] 2 K.B. 176, 195, 196, per Clauson, L.J. Upon the retrospective effect of the *de jure* recognition of the King of Italy as the Emperor of Ethiopia, see *Haile Selassie v. Cable & Wireless, Ltd.* (No. 2) [1939] Ch. 182, 197, per Sir Wilfrid Greene, M.R. Upon the retrospective effect of recognition of the Soviet Government as the *de facto* government of Russia, see *A. M. Luther v. James Sagor & Co.* [1921] 3 K.B. 532, 556, 557, per Scrutton, L.J. (see McNair, 332, 360).

<sup>3</sup> *Janson's Case* [1902] A.C. 484, 500, per Lord Davey, affirming the decision of Mathew, J. [1900] 2 Q.B. 339, and of the Court of Appeal [1901] 2 K.B. 419.

<sup>4</sup> *Muller v. Thompson* (1811), 2 Camp. 609, 610.



Kingdom. In August, 1899, the gold had been insured by British underwriters against capture during transit. The insurance, it was held, was valid : in an action upon the policy, the underwriters were liable. "The seizure of the gold was not, in itself, an act of hostility against this country."<sup>1</sup>

Lord Macnaghten, in a famous passage, declared :—

"The law recognises a state of peace and a state of war, but . . . it knows nothing of an indeterminate state which is neither the one thing nor the other—neither peace nor war."<sup>2</sup>

## II. HIS MAJESTY'S ENEMIES

### 1. *Germany*

On 3rd September, 1939, at 11 a.m., a state of war was declared to exist between His Majesty and Germany.

The German Government had been asked to give satisfactory assurances that all aggressive action against Poland had been suspended and that they would promptly withdraw their forces from Polish territory, failing which His Majesty's Government in the United Kingdom would, without hesitation, fulfil their obligations to Poland to come to her assistance.<sup>3</sup> No such assurance within the period stated was received ; the German Chargé d'Affaires in London was accordingly notified that a state of war existed between the two countries.<sup>4</sup>

### 2. *Italy : Enemy, then co-Belligerent*

On 11th June, 1940, the King of Italy considered himself in a state of war with the United Kingdom and, in consequence of this act, a state of war thereupon existed between the two countries.<sup>5</sup>

On 3rd September, 1943, a military armistice was signed by the representative of General Eisenhower (Commander-in-Chief of the United Nations) and a representative of Marshal Badoglio (of the Italian Government), whereby all hostile activity by Italian armed forces ceased.<sup>6</sup> The armistice came into effect

<sup>1</sup> *Janson's Case* [1902] A.C., at 500, per Lord Davey.

<sup>2</sup> *Ib.*, 497.

<sup>3</sup> *For The Agreement of Mutual Assistance between the Government of the United Kingdom and the Government of Poland*, signed on 25th August, 1939, see *A.J.I.L.*, vol. 35 (1941), *Supp.*, 173-175, *The Annual Register*, vol. 181 for 1939, 403, 404.

<sup>4</sup> *London Gazette*, 3rd September, 1939. *Australia and New Zealand* announced the declaration of war on the same day. On 6th September, 1939, the Governor-General of the Union of *South Africa* issued a proclamation that the Union was at war with the German Reich (*The Times*, 8th September, 1939). On 10th September, the Governor-General of the Dominion of *Canada* issued a proclamation declaring that, as from that day, a state of war existed (*Canadian Gazette*, 10th September, 1939). *Etire* remained neutral. (Trotter, 5-6.)

<sup>5</sup> *London Gazette*, 11th June, 1940.

<sup>6</sup> *The Times*, 13th September, 1943. See also *A.J.I.L.*, vol. 38 (1944), 127.

on 8th September, 1943. On 13th October, 1943, Italy declared war on Germany and was accepted as a co-belligerent by Great Britain, Russia and the United States.<sup>1</sup>

### 3. Japan

On 8th December, 1941, the Prime Minister addressed a Note to the Japanese Chargé d'Affaires in London, stating that in view of "wanton acts of unprovoked aggression committed in flagrant violation of international law, and particularly of Article 1 of the Third Hague Convention, relative to the opening of hostilities, to which both Japan and the United Kingdom are parties," the British Ambassador at Tokyo had been instructed to inform the Japanese Government that a state of war existed between the two countries.<sup>2</sup>

### 4. Finland

From and including 7th December, 1941, a state of war existed between the United Kingdom and Finland. On 19th September, 1944, an armistice was signed (Cmd. 6586).

His Majesty's Government had informed the Finnish Government that unless by 5th December, 1941, the Finnish Government ceased "aggressive military operations" on the territory of Russia, the ally of Great Britain, and withdrew from all active participation in hostilities, His Majesty's Government would have no choice but to declare the existence of a state of war between the two countries.<sup>3</sup> On 1st March, 1945, Finland declared war on Germany.

<sup>1</sup> For the term, see McNair, 39.

<sup>2</sup> *London Gazette*, 11th December, 1941. On 7th December, 1941, Japanese forces, without warning, either by declaration of war or by ultimatum with a conditional declaration of war, had attempted a landing in Malaya, and had bombed Singapore and Hong Kong. On 8th December, 1941, the President of the United States sent a message to Congress declaring that while the United States was in conversation with the Japanese Government concerning the maintenance of peace in the Pacific, Japanese forces, on 7th December, 1941, had attacked the Hawaiian Islands and the Philippine Islands, and had torpedoed American ships. He asked Congress to declare that since 7th December, 1941, a state of war existed between the United States and the Japanese Empire. The Senate and the House of Representatives, accordingly, in Congress assembled, passed a Joint Resolution that a state of war existed. For *The Message* and *The Resolution*, see *A.J.I.L.*, vol. 36 (1942), 77-89. *The Annual Register*, vol. 183, for 1941, 391, 392. For the Documents upon the relations of the United States and Japan, see *A.J.I.L.*, *Supp.*, 24, 24-56, 95-150.

On 11th December, 1941, the Governments of Germany and of Italy declared war against the United States. The President, thereupon, sent a message to Congress requesting Congress to recognise a state of war between the United States and Germany, and between the United States and Italy. Separate resolutions, accordingly, were passed (*A.J.I.L.*, vol. 36 (1942), *Supp.*, 1 and 3; *The Annual Register*, *loc. cit.*, 393).

<sup>3</sup> *London Gazette*, 8th December, 1941. Roumania, Bulgaria and Hungary having declared war against the United States, on 17th July, 1942, a state of war was declared between United States and Roumania, Bulgaria and Hungary (*A.J.I.L.*, vol. 36 (1942), *Supp.*, 107-198).

### 5. *Hungary*

From and including the same date, and after a similar ultimatum, to which no reply was given, a state of war existed between the United Kingdom and Hungary.<sup>1</sup>

### 6. *Roumania*

The facts are the same as those relating to Hungary.<sup>1</sup> On 12th September, 1941, an armistice was signed and Roumania became co-belligerent (Cmd. 6585).

On 24th August, 1944, the state of war between Roumania and the Soviet Union, Great Britain and the United States, ceased.

### 7. *Bulgaria*

From and including 13th December, 1941, a state of war existed between the United Kingdom and Bulgaria.

His Majesty's Government in the United Kingdom were informed that a declaration of war on Great Britain by Bulgaria had been announced that day in the Bulgarian Parliament. His Majesty's Government accordingly notified that as from that date a state of war existed between the two countries.<sup>2</sup>

### 8. *Thailand*

From and including 25th January, 1942, a state of war existed between the United Kingdom and Thailand (Siam).

His Majesty's Government in the United Kingdom were informed that on that date a declaration of war had been made on Great Britain by the Thai Government. A state of war accordingly existed between the two countries.<sup>3</sup>

## III. THE UNITED NATIONS

### 1. "*The Atlantic Charter*" ; *Signatories*

"The United Nations" are at war with Germany or Japan, or both, and until 12th October, 1943,<sup>4</sup> were at war with Italy.

On 1st January, 1942, a *joint declaration* by the United Nations was made at Washington. Each signatory government having subscribed to "a common program of purposes and principles" embodied in the joint declaration dated 14th August, 1941, made at sea by the President of the United States and the Prime Minister of the United Kingdom, and known as "the Atlantic Charter"<sup>5</sup>—pledged itself to employ its full

<sup>1</sup> See note 3, at p. 5, *ante*. On 20th January, 1945, an armistice was signed.

<sup>2</sup> *London Gazette*, 26th December, 1941. Armistice, 28th October, 1944, Cmd. 6587.

<sup>3</sup> *Ib.*, 6th February, 1942.

<sup>4</sup> *A.J.I.L.*, vol. 38 (1944), 129.

<sup>5</sup> Text, *A.J.I.L., Supp.*, vol. 35 (1941), 191, 192 ; Cmd. 6388 (1942).

The *Charter* lays down *eight principles* 1. No aggrandisement. 2. No territorial changes not according with the fully expressed wish of the peoples concerned. 3. Right of all peoples to choose their form of government. 4. All States to have equal access to trade and raw materials of the world. 5. Economic collaboration between all nations for social security. 6. The establishment of a peace affording safety to all nations, and to all men freedom from fear and want. 7. Freedom to traverse the high seas. 8. Disarmament of aggressors an essential preliminary.

resources against those members of the Tripartite Pact<sup>1</sup> with which it was at war, to co-operate with the other signatory governments, and not to make a separate armistice or peace with the enemies.

This declaration may be adhered to by other nations rendering material assistance and contributions in the war.<sup>2</sup>

Twenty-six governments signed the declaration. These are their countries :—

The United States of America<sup>3</sup>; the United Kingdom;  
the Union of Socialist Soviet Republics<sup>4</sup>, China; Australia;

<sup>1</sup> On 22nd May, 1939, a *Pact of Friendship and Alliance* had been signed between Germany and Italy, in the event of a war waged by them jointly, they would not, without full agreement, conclude an armistice or peace (Text, *A J I L.*, vol. 35 (1941), *Supp.*, 32-34)

On 27th September, 1940, the *Tri Power Accord* was signed by Germany, Italy and Japan; the three countries undertook to assist one another when one of the three Powers was attacked by a Power not then at war or in the Chinese Japanese conflict (Text, *A J I L.*, *ib.*, 34, 35). Cmd 6388 (1942)

<sup>2</sup> Iran on 29th January, 1942, declared agreement with the principles of the Atlantic Charter and a Treaty of Alliance was signed at Teheran between His Majesty, the Union of Socialist Soviet Republics and His Imperial Majesty the Shahinshah of Iran (Text, *A J I L.*, vol. 36 (1942), *Supp.*, 175, 176, *Annual Register*, vol. 184 for 1942, 395-397)

On 9th September, 1943, Iran declared war Turkey declared war on 23rd February, 1945, and Egypt on 24th February

<sup>3</sup> See *The Mutual Aid Agreement*, signed at Washington on 23rd February, 1942, between the Governments of the United States of America and of the United Kingdom (Text *A J I L.*, vol. 36 (1942), *Supp.*, 170-173)

<sup>4</sup> On 12th July, 1941, an agreement was signed in Moscow, providing for joint action by His Majesty's Government in the United Kingdom and the Government of the Union of Socialist Soviet Republics in the war against Germany. By the Protocol, the agreement came into force on signature and was not subject to ratification (Text, Great Britain, Treaty Series, No. 15 (1941), Cmd 6304; *A J I L.*, vol. 36 (1942), *Supp.*, 58, 59, *The Annual Register* for 1941, 388, 382).

On 26th May, 1942, a *Treaty of Alliance* was signed (ratifications of which were exchanged at Moscow, 4th July, 1942, when the Treaty came into force) between the Union of Socialist Soviet Republics and the United Kingdom, confirming and replacing the *Agreement* for joint action in the war against Germany of 12th July, 1941, and replacing it by a formal Treaty. The High Contracting Parties agreed "not to negotiate or conclude, except by mutual consent, any armistice or peace treaty with Germany or any other State associated with her in acts of aggression in Europe" (art. II). Should one of the Parties during the post-war period become involved in hostilities with Germany or an associated State in consequence of an attack by that State against that Party, the other Party will at once give all possible assistance. In default of the adoption of proposals among like-minded States for common action to preserve peace, the article remains in force for twenty years (art. IV). The Parties will work together after the re-establishment of peace "for the organisation of security and economic prosperity in Europe, . . . in accordance with the two principles of not seeking territorial aggrandisement for themselves and of non interference in the internal affairs of other States" (art. V). Each Party will not conclude any alliance or take part in any coalition against the other Party (art. VII). Articles III-VIII remain in force for twenty years. Text, *A.J.I.L.*, vol. 36 (1942), *Supp.* 216-218; *The Annual Register* for 1942, 399-402.

And see *declarations* of Great Britain, the Soviet Union and United States, made at Moscow, 1st November, 1943, and at Teheran, 1st December, 1943 (Text, *A.J.I.L.*, vol. 38 (1944), *Supp.*, 3-10).

Belgium ; Canada ; Costa Rica ; Cuba ; Czechoslovakia ; Dominican Republic ; El Salvador ; Greece ; Guatemala ; Haiti ; Honduras ; India ; Luxembourg ; The Netherlands ; New Zealand ; Nicaragua ; Norway ; Panama ; Poland ; South Africa ; Yugoslavia.<sup>1</sup>

Mexico, The Philippines, Ethiopia, Iraq, Brazil, Bolivia, Liberia, Persia and France have subsequently signed.

The Crimea Conference laid the foundations of peace.<sup>2</sup>

## 2. *Governments in Exile*

Czechoslovakia, Poland, Norway, Belgium, The Netherlands, Luxembourg, Greece, and Yugoslavia, while held by the enemy, were, in law, "enemy territory."<sup>3</sup> Their Governments in Exile, established in the United Kingdom, had been recognised by His Majesty's Government as the only sovereign representatives of their countries.<sup>4</sup> "The recognition of the governments in London after the invasion of their countries in Europe is clearly in accord with the old and well-established principle of international law that belligerent occupation does not affect the sovereignty of the occupied State. The occupying power is not successor to the lawful sovereign in the occupied territory, but is a government based on force exercised as a war measure."<sup>5</sup> These governments exercised legislative powers over their subjects especially for the purpose of preventing their assets from being seized by the enemy and their decrees were published in the official *Gazettes* in London.<sup>6</sup>

" . . . occupation does not displace or transfer sovereignty. The occupant is entitled to exercise military authority over the territory occupied, but he does not acquire sovereignty unless and until it is ceded to him by a treaty of peace (which is the common method) or is simply abandoned in his favour without cession, or is acquired by him by virtue of subjugation, that is, extermination of the local sovereign and annexation of his territory . . ."<sup>7</sup>

The official acts of a dispossessed government are recognised by the English courts "provided that its constitutional law contains no insuperable obstacle to the validity of such legislation or other sovereign acts, and provided that His Majesty continues

<sup>1</sup> Text, *A.J.I.L.*, vol. 36 (1942), *Supp.* 191, 192; (1942), *Cmd.* 6388.

<sup>2</sup> Report, 11th February, 1945, *Cmd.* 6598.

<sup>3</sup> *The Sorfracht Case* [1943] A.C. 203, *infra*. Trading with the Enemy Act, s. 15.

<sup>4</sup> Oppenheimer, *Governments and Authorities in Exile*, *A.J.I.L.*, vol. 36 (1942), 568, 595; Domke, 351, 352, and Chap. 21, 345-381, *Administration of National Assets Abroad by Governments in Exile*. See also McNair, 355-383.

<sup>5</sup> Oppenheimer, *op. cit.*, 571.

<sup>6</sup> Oppenheimer, *op. cit.*, 584-6, for list, and details cited.

<sup>7</sup> McNair 320.

to recognise it as the *de jure* government and recognises no other government as the *de facto* sovereign."<sup>1</sup>

Belgium and Holland have authorised the transfer abroad of the domicile and management of companies carrying on business in occupied territory. "The title to assets situate abroad of nationals in occupied territory is vested in the exiled government"<sup>2</sup>; the courts of England and the New York State have upheld such legislation as not confiscatory, but conservatory, since compensation would be fixed.<sup>3</sup> Thus the Norwegian Government requisitioned Norwegian ships situate outside Norway. After agreement between the Allied Governments and His Majesty's Government, the Minister of Labour and National Service issued certain International Labour Force Orders providing for the registration of their nationals within Great Britain when the Orders came into effect.<sup>4</sup>

Each allied government maintains its own armed forces and has issued decrees conscripting its nationals residing outside occupied territory.<sup>5</sup> Their legal status is regulated by the Allied Forces Act, 1940, and Allied Powers (War Service) Act, 1942, and the appropriate treaty concluded between the Allied Governments and His Majesty's Government. In matters of discipline and internal administration (except for offences against the law of the United Kingdom) their Service courts have exclusive jurisdiction.<sup>6</sup>

<sup>1</sup> *Ib.*, 357. See also *ib.*, 363, citing Dicey, *Conflict of Laws* 5th ed., 20, and Beale, *Conflict of Laws*, i, 308, 314, ss. 59.2, 63.1.

<sup>2</sup> Oppenheimer, *op. cit.*, 585; Domke, 346, 347.

Upon protective expropriatory decrees of governments in exile, see (1941), 41 Columbia Law Review, 1072-1086.

<sup>3</sup> *Lorentzen v. Lydden & Co., Ltd.* [1942] 2 K.B. 202; *Lorentzen v. White Shipping Co., Ltd.* (1942), 74 Ll. L. Rep. 161; Note, Keith, *Journ. Comp. Legal*, vol. XXXIV (1942), 131; Domke, 359, 361; *The Anderson Case* (1941), 28 N.Y.S. (2d) 547, per Shientag, J.; *affd.* App. Div. 31 N.Y.S. (2d) 194, per Lehman, Ch. J.

<sup>4</sup> Under Defence Regulation 58A; S.R. & O., 1941, Nos. 719 (Belgium), 720 (Netherlands), 721 (Norway), 722 (Poland), 723 (Czechoslovakia), 724 (Free French). See Oppenheimer, *op. cit.*, 588: "The enrolment of aliens for non-combatant service is a usage recognised in international law."

<sup>5</sup> Oppenheimer, *op. cit.*, 589-592.

<sup>6</sup> *Op. cit.*, 592; ss. 1 (1), 2 (1). See King, *Jurisdiction over Friendly Armed Forces*, A.J.J.L., vol. 36 (1942), 539-567, who cites, *inter alia*, the judgment of Marshall, C.J., in *The Exchange* (1812), 7 Cranch 116, 139: "A third case in which a sovereign is understood to cede a portion of his territorial jurisdiction is, where he allows the troops of a foreign prince to pass through his dominions." The opinion—"a judgment which has illumined the jurisprudence of the world"—was cited and approved by Lord Atkin in *Chung Chi Cheung v. The King* [1939] A.C. 160, 168. See Oppenheimer, *International Law* (1928), 4th ed., I, ss. 445, 446, 446A. King suggests that the draftsman of the Act overlooked or disregarded that opinion. The courts martial of the United States have exclusive jurisdiction over their soldiers and sailors unless, in a particular case, upon the representations of the United States Government, a Secretary of State by order

On 3rd November, 1941, the *Netherlands Maritime High Court* was inaugurated in the Guildhall under the Allied Powers (Maritime Courts) Act, 1941, which provides that the Allied and Associated Powers, as directed by His Majesty by Order in Council, may maintain in the United Kingdom "courts of justice to be called Maritime Courts," having such criminal jurisdiction as is conferred on them by the Act. The Act recognises that "the law of any power" includes such law in force by virtue of any "*legislative instrument whatever*," e.g., a decree, as opposed to a statute and whether made *before or after* a government was established in the United Kingdom. The Act is for the duration of the emergency. "It is wholly exceptional to concede to a foreign court the right to try its own subjects within the King's peace," said the Lord Chancellor. And its President declared: "It represents an entirely new departure in international law." Dutch magistrates will according to Dutch law and Dutch procedure adjudicate on British soil on three groups of offences. "No sovereign State has ever before allowed the civil magistracy of any other country to exercise their functions on its territory, except as a result of a special treaty . . . and, with a few exceptions, in consular jurisdiction."<sup>1</sup>

#### (a) *Czechoslovakia*

On 21st July, 1940, the Foreign Secretary wrote to Dr. Benes, the President of the Czechoslovak Republic, that His Majesty's Government in the United Kingdom recognised the provisional Czechoslovak Government constituted in this country. On

directs that this provision shall not apply: United States of America (Visiting Forces) Act, 1942, s. 1 (1), giving effect to an agreement recorded in Notes exchanged between the two Governments. The Supreme Court of the United States took the view that their visiting soldiers and sailors are equally exempt from *civil* jurisdiction: *Coleman v. Tennessee* (1878), 97 U.S. 509, 515, *per* Field, J.; *Dow v. Johnson* (1879), 100 U.S. 158, 165, *per* Field, J. Apparently, no civil suit was brought against a member of the American Expeditionary Force in an English or French court during the first World War: *A.J.I.L.*, *op. cit.*, 561. Subject to certain limitations, he thinks that civil suits against members of visiting forces ought to be allowed (*ib.*, 564). British military personnel in the United States are probably exempt from the jurisdiction of the United States courts (*ib.*, 506).

See also Norman Bentwich. *The U.S.A. Visiting Forces Act, 1942* (1942), 6 Mod. L. Rev., 68-72; Powell-Hartmann, *The Allied Powers (War Service) Act, ib.*, 72-75; Schwelb, *The Status of the United States Forces in English Law, A.J.I.L.*, vol. 38, (1944), 50-73.

<sup>1</sup> Sections 1 (1), 2 (1). For procedure, see s. 5; and upon attendance of witnesses, s. 6; for detention, s. 7. "Law of any power" is defined in s. 17 (4). See *The Allied Maritime Courts*, Speeches by Viscount Simon, L.C., and Dr. J. M. de Moor, President of the Netherlands Maritime High Court (1942), 58 L.Q.R. 41-52, 42, 44; Viscount Simon, L.C., *Foreign Maritime Courts, Journ. Comp. Leg.* (1942), vol. XXIV, 1-5. See also *A.J.I.L.*, *ib.*, 593, 594. And see Allied Powers Maritime Courts Regulations, S.R. & O., 1941, Nos. 872 and 873/L.14. Maritime Courts have been established by Belgium, Greece, The Netherlands, Poland and Yugoslavia (*ib.*, 594). For an account of procedure, see Jessup, *Norwegian Maritime Courts in England, A.J.I.L.*, vol. 36 (1942), 653-657.

18th July, 1941, full recognition was accorded. The effect of this recognition is that they are the only lawful Government of their country "exclusively competent to exercise all those functions—legislative, administrative, and other—that appertain to them by virtue of their constitutional position in England."<sup>1</sup> Legislative power for the duration of the emergency is exercised in the form of decrees by the "President in Council."

(b) *Poland*

"The present President of the Republic and the Polish Government are legal successors of the previous President and Government and, although acting on foreign soil, have all the powers given to them by the Polish Constitution."<sup>2</sup> For the duration of the war, the Polish National Council was set up as advisory body of the President and the Government. Legislation is by Presidential decree. The Crimea Conference agreed that a Provisional Government of National Unity should be constituted in Poland, which would then be recognised by the three major Powers.

(c) *Norway*

The Norwegian Cabinet in the United Kingdom, appointed in Norway in 1935, had been empowered by the Storting before the invasion of Norway to enact all requisite legislation during the war. On 7th June, 1940, the Government left Norway and established itself in the United Kingdom.<sup>3</sup> On 7th November, 1941, the Norwegian Maritime High Courts were set up in various towns; an Appeal Court sits in London.<sup>4</sup>

The status of the Royal Norwegian Government in the United Kingdom and the extra-territorial effect of its decrees were carefully considered by Atkinson, J., in *Lorentzen v. Lydden & Co., Ltd.*<sup>5</sup>

<sup>1</sup> Schwelb, *Legislation in Exile Czechoslovakia* (1942), vol. XXIV, *Journ. Comp. Legist.*, 120, 124, 121, 123; Oppenheimer, *op cit.*, 570, 571; Ta'orsky, *The Czechoslovak Judicial Council* (1943), 6 *Mod. L. Rev.*, 143-148; *A.J.I.L.*, vol. 37 (1943), *Supp.*, 2, 3.

<sup>2</sup> Lachs, *Polish Legislation in Exile* (1942), vol. XXIV, *Journ. Comp. Legist.*, 57-60, 57; Oppenheimer, *op. cit.*, 569, 570. But see *Cmd. 6598* (1945).

<sup>3</sup> *Legislation in Exile Norway* (1942), vol. XXIV, *Journ. Comp. Legist.*, 125-130.

<sup>4</sup> *S.R. & O.*, 1941, No. 800. See speech of Viscount Simon, L.C. (1942), 58 *L.Q.R.*, 50-52; *A.J.I.L.*, vol. 36 (1942), 653-657.

<sup>5</sup> [1942] 2 K.B. 202. Among authorities cited in the judgment are McNair (1941), 57 *L.Q.R.* 47; Dicey, *Conflict of Laws*, 5th ed., r. 154; *The Jupiter* (No. 3) [1927] P. 122, 141, *per* Hill, J., upon effect of a Russian decree on a ship in Odessa, not then in the State of Russia, vesting in the State all ships belonging to individuals or companies; *The Goukassow Case* [1923] 2 K.B. 682, 693, *per* Atkin, L.J.; *The Sedgwick Case* [1926] 1 K.B. 1, 15, *per* Sargant, L.J.; [1927] A.C. 95. Upon the true construction of the nationalisation decrees of the U.S.S.R., it was held that they did not operate outside the territory of the Republic—not that they could not so operate: *The Jupiter* (No. 3) [1927] P. 250, 253, *per* Bankes, L.J.; 255, *per* Lawrence, L.J., as explained at [1942] 2 K.B. 209. Of



L, the curator appointed by that Government, sued on behalf of the owners of the steamship *Tempo* trading at Oslo, a company carrying on business in London. The action was for damages for breach of a contract of charter. His title was based upon an Order in Council of his Government made in May, 1940, at Trondjhem requisitioning Norwegian ships situate outside Norway owned by persons resident or trading in Norway and authorising the Minister of Shipping, as "curator," to collect and sue for claims "belonging to" shipowners. The defendants put his title in issue, alleging that the Norwegian Government could not by legislative or executive act transfer property in this country. The issue of title was heard as a preliminary point of law. Compensation for what was taken over would be fixed by Norwegian law. Expert evidence was given and accepted by the judge that the order was properly made and was binding upon Norwegian subjects.

Foreign legislation, it was argued, can have no extra-territorial effect. The *situs* of a debt is generally the country where the debtor is to be found and sued. The learned judge read a letter from the Foreign Office stating that the Norwegian Government is recognised as "the *de jure* Government of the entire Kingdom of Norway" and that His Majesty's Government in the United Kingdom have never recognised any other Government as either the *de jure* or the *de facto* Government of Norway. Having cited the English authorities upon the effect of Soviet legislation, Atkinson, J., quoted extensively with approval from *The Anderson Case*,<sup>1</sup> a decision of Shientag, J., in the New York Supreme Court (subsequently affirmed by the New York Court of Appeals). That case concerned the effect

Scrutton, L.J.'s judgment in *Princess Paley Olga v. Weisz* [1929] 1 K.B. 718, 725, Atkinson, J., remarks: "I decline to read into that judgment an affirmative statement that in no circumstances will our courts give extra territorial effect to decrees of a foreign State": [1942] 2 K.B. 210. Sankey, L.J.'s judgment (at 728, 729) had referred with approval to this passage in *Oetjen v. Central Leather Co.* (1918), 246 U.S. 297, 303: "The principle that the conduct of one independent Government cannot be successfully questioned in the courts of another is as applicable to a case involving the title to property brought within the custody of a court . . . as claims for damages based upon acts done in a foreign country, for it rests at last upon the highest considerations of international comity and expediency." This case was followed in *A. M. Luther v. James Sagor & Co.* [1921] 3 K.B. 532, 546, 557-559. Of Maugham, J.'s judgment in *Re Russian Bank for Foreign Trade* [1933] Ch. 745, 763, 767, Atkinson, J., observes: "The learned judge was dealing with Soviet confiscatory legislation, and with the effect of decrees which did not purport to have extra territorial effect. I cannot regard his decision as one governing the effect on a chose in action in this country of a decree which is not confiscatory and which in terms purports to deal with, and deal only with, extra territorial property": [1942] 2 K.B. 212.

<sup>1</sup> *Anderson v. N. V. Transandine Handelsmaatschappij* (1941), 28 N.Y.S. (2d), 547. For the judgment of Lehman, Ch. J., see *A.J.J.L.*, vol. 36 (1942), 701-707. For a critique of this decision, see McNair 368-371. And see *ib.*, 371-372, on the *Lorentzen Case*.

of the decree of the Royal Netherlands Government vesting in the State, accounts and securities belonging to persons domiciled in Holland, and deposited in America. That judge, in his "scholarly opinion," declared :—

"Legislation of a recognised foreign State, vesting title in the State to property of its nationals, is not contrary to the public policy of the United States or of the State of New York. The leading case in this field is *United States v. Belmont*."<sup>1</sup>

English law, Atkinson, J., held, is the same. This was not a "confiscatory decree"; "England and Norway are engaged together in a desperate war for their existence, and [that] public policy demands that effect should be given to this decree. To suggest that the English courts have no power to give effect to a decree making over to the Norwegian Government ships under construction in this country seems to me to be almost shocking."<sup>2</sup>

(d) *Holland*.

The Government of the Netherlands is allied with His Majesty and established in the United Kingdom, where, with the assent

<sup>1</sup> (1937), 301 U.S. 324, 332, *per* Sutherland, J. The effect of the recognition of the Soviet Government was to validate, from the date of its existence, all acts of that Government, nor could its decrees in the way of taking over the property of its nationals be questioned.

In *United States v. Pink* (1942), 62 Sup. Ct. 552, the Supreme Court followed and extended the *Belmont* decision (Stone, C.J., and Roberts, J., dissenting). Report, *A.J.I.L.*, vol. 36 (1942), 309-338: criticism, *Borchard, ib.*, 275-282; Jessup, *ib.*, 282-288. The United States sued, in effect, as assignee of the Russian Government for claims by that government against a Russian insurance company for moneys on deposit in New York. The Supreme Court held that the right to the funds became vested in the Soviet Government as successor to the insurance company and that, under the Litvinov assignment, the right passed to the United States, which was entitled to it as against the corporation and the foreign creditors.

<sup>2</sup> [1942] 2 K.B. 215, 216. An appeal was dismissed by consent. In *Banco de Vizcaya v. Don Alfonso de Borbon Y Austria* [1935] 1 K.B. 140, 146, *per* Lawrence, J., it was held that the decree confiscating the property of the ex-King of Spain was penal, confiscatory and unenforceable. The Norwegian decree was recognised by the Supreme Court of Sweden in *The Rigmor Case, A.J.I.L.*, vol. 37 (1943), 141: noted, Domke, 362. The Norwegian Government had taken over a tanker owned by a Norwegian company carrying on business in Oslo, and had chartered it to the British Government. The court rejected the claim of the original owner for possession on the ground of the immunity of the British Government, but also recognised the Norwegian decree. See McNair, 381, and upon the *position of ships* generally, 377-382.

Upon the invalidity of confiscatory decrees outside the country where they were made, see F. A. Mann, in (1942), 5 Mod. L. Rev., 262, 263, criticising this decision, and referring to Borchard, *A.J.I.L.*, (1937), vol. 31, 675-681, who, in turn, had criticised *U.S. v. Belmont* (1937), 301 U.S. 324. It was there held that the effect of the recognition of the Soviet Government was "to validate, so far as this country is concerned, all acts of the Soviet Government here involved from the commencement of its existence" (at 331). And again: "What another country has done in the way of taking over property of its nationals, and especially of its corporations, is not a matter for judicial consideration here. Such nationals must look to their own government for any redress to which they may be entitled" (at 332).

and on the invitation of His Majesty's Government in the United Kingdom, it exercises its functions. The Queen and her Government are recognised as "exclusively competent to perform the legislative, administrative and other functions appertaining to the Sovereign and Government of the Netherlands."<sup>1</sup> By Order in Council, certain parts of the Visiting Forces (British Commonwealth) Act, 1933, have been applied, under the Allied Forces Act, 1940, to the Netherlands. An executive decree was made by the Queen in August, 1940, and published in the Official Netherlands Gazette, concerning compulsory military service of Netherlands subjects residing in the United Kingdom. An Act of Parliament of the United Kingdom proves itself, but "the legislative act of a foreign Power" must be proved by evidence as a question of fact.<sup>2</sup> There is nothing in the constitution of the Netherlands to prevent its Government even without the Legislature, the court held, from legislating upon the duties of its subjects, even while they are within the United Kingdom.<sup>3</sup> Although the English courts cannot question the validity of the acts of an independent sovereign government concerning property and persons within its jurisdiction, they will investigate the validity of a decree affecting the personal freedom of a national of that sovereign government resident in this country, especially since that national cannot apply for redress in his own courts.<sup>4</sup>

In the *Anderson Case*, in New York, the validity of a decree of the Netherlands Government of 24th May, 1940, was upheld, vesting in the State of the Netherlands the title to property and funds outside of the realm in Europe and belonging to persons domiciled in the Netherlands. A non-resident alien, the assignee of securities, sued the defendant corporation for damages for failure to deliver them up. The plaintiff had attached and

<sup>1</sup> *In re Amand* [1941] 2 K.B. 239, 240, 250, *per* Viscount Caldecote, C.J.

For legislation by the Belgian and Luxembourg Governments while in exile, see *Fayat, Legislation in Exile: Belgium*, vol. XXV (1943), *Journ. Comp. Legist.*, 30-40; *Cohn, Legislation in Exile: Luxembourg*, *ib.*, 40-46. See also Zeeman, *Legislation in Exile: The Netherlands*, vol. XXVI (1944), *op. cit.*, 4-11.

<sup>2</sup> [1941] 2 K.B., at 253. See *McNair*, (1941), 58 L.Q.R. 33, 69.

<sup>3</sup> See the interesting argument to the contrary, *viz.*, that the decree was invalid and had no extra-territorial effect (*ib.*, at 244, 245, 248, 249). See *A.J.I.L.*, vol. 36 (1942), 581, 582, upon *Crisis Legislation*.

The Dutch decree conscribing Dutch subjects was recognised in South Africa, as binding Dutch subjects resident there: *Haak & Others v. Minister of External Affairs* (1942), noted in (1942), 59 South African Law Journal, 313, 314.

<sup>4</sup> *In re Amand* (No. 2) [1942] 1 K.B. 445, 454, *per* Cassels, J. See *Luther v. James Sagor & Co.* [1921] 1 K.B. 456, 474, *per* Roche, J.; 3 K.B. 532, 548, *per* Warrington, L.J.

See Powell-Hartmann (1942), 5 Mod. L. Rev., 256-261, maintaining that no inquiry should be made into the validity of the acts of a foreign government. And see *McNair*, 375-377, who regards the decision as limited to its peculiar facts and as no authority for the general proposition that an English court must examine the constitutional validity of a foreign decree.

levied on the defendants' property and they moved to vacate the attachment on the ground that the property belonged to the State of the Netherlands. The Government of the United States recognises the Netherlands Government. "As such the acts of the Royal Netherlands Government must be deemed to be the acts of the State of the Netherlands," said Shientag, J.<sup>1</sup> On appeal, Lehman, Ch. J., said that recognition of a foreign government is a "determination of *political* questions." "The scope and the effect within this State of a decree promulgated by the recognised government are judicial questions, just as the scope and effect of the law of any long-established and recognised friendly foreign government, like England, would be judicial questions."<sup>2</sup> He continued:—

"By comity of nations, rights based upon the law of a foreign State to intangible property which has a *situs* in this State are recognised and enforced by the courts of this State, unless such enforcement would offend the public policy of this State. That rule is part of the law of this State, as it is, in general, the law of all countries which accept the reign of law."

The decree is not confiscatory: under the terms, the State becomes, in effect, a trustee of property which might otherwise be seized by the enemy, for it provides restitution three months after the cessation of the "emergency conditions," i.e., the invasion. "A decree designed for such purposes and having such effect may hardly be said to offend a public policy of this State."<sup>3</sup>

#### IV. DURATION OF WAR: COMMERCIAL CONTRACTS

"It is impossible for any court to speculate as to the duration of the war . . .," said Viscount Haldane in the *Tamplin Case*.<sup>4</sup> The requisition by the Admiralty in February, 1915, of the tank steamship

<sup>1</sup> (1941), 28 N.Y.S. (2d) 517; Domke, 359 *et seq.*; cited by Atkinson, J., in *Lorentzen v. Lydden & Co., Ltd.* [1942] 2 K.B. 202, 212-215.

<sup>2</sup> Judgment at *A.J.I.L.*, vol. 36 (1942), 701-707; at 703, 706, 707. In *Guaranty Trust Co. v. United States* (1938), 304 U.S. 126, 137, Stone, J., said: "Whether government is to be regarded here as representative of a foreign Sovereign State is a political rather than a judicial question, and is to be determined by the political department of the government."

<sup>3</sup> This decision was distinguished in *Estate of Emanuel Kahn* (1942), 38 N.Y.S. (2d) 839, where a Dutch national died intestate in the Hague and his daughter, resident in New Jersey since 1940, applied for administration. The Public Administrator applied against a New York Bank for an order to deliver up securities and moneys on deposit owned by the deceased. The court said that in the administration of estates containing property within the jurisdiction, the local law was superior to rights created under treaties or foreign edicts (Domke, 364, 365; see also 377).

<sup>4</sup> *F. A. Tamplin Steamship Co., Ltd. v. Anglo-Mexican Petroleum Products, Ltd.* [1916] 2 A.C. 397, 411, *infra*.

the *F. A. Tamplin*, under a time charter in force until December, 1917, was "of a character so sweeping," he thought, since it could be used for purposes "altogether outside the contract and that for a time to which no limit could be assigned," that "the entire basis of the contract" so far as concerned performance in February, 1915, or "at any calculable period in the future" was swept away. Viscount Haldane dissented: his view, it is submitted, was right.

Where, in a claim upon a charterparty for failure to load at Hamburg and to carry out the charterparty, the defence was that war broke out between France and Germany, that Hamburg was blockaded by the French fleet and that, England remaining neutral, the defendants, who were British subjects, could not lawfully carry thither on a British ship, Lush, J., said:—

"If the impediment had been in its nature temporary, I should have thought the plea bad; but a state of war must be presumed to be likely to continue so long, and so to disturb the commerce of merchants, as to defeat and destroy the object of a commercial adventure like this."<sup>1</sup>

This observation has been quoted with approval in several recent cases in the House of Lords.<sup>2</sup>

Lord Shaw applied the principle to a seaman's contract of service for a two-years' voyage interrupted, upon the declaration of war in August, 1914, by the detention of the ship and the internment of the crew.

"That stoppage and loss," he said, "having arisen from a declaration of war, must be considered to have been caused for a period of indefinite duration, and so to have effected a solution of the contract arrangements for and dependent upon the completion of further continuance of the adventure."<sup>3</sup>

Here are the observations of Lord Atkinson made in the *De Keyser Case* after the war had ended. He is speaking of the liability of the Crown to pay for the use and occupation of property of which, under the Defence of the Realm Regulations, it had taken possession:—

"The Attorney-General . . . relied much on the word 'temporary'—temporary use, temporary occupation. What does the word 'temporary' mean in such a connection?"

It might cover years, yet mean only the duration of the war. In this case it covered three years. At the beginning

<sup>1</sup> *Geipel v. Smith* (1872), L.R. 7 Q.B. 404, 414, 415.

<sup>2</sup> *The Fibrosa Case* [1943] A.C. 32, 41, per Viscount Simon, L.C. *The Denny Mott Case* [1944] A.C. 265, 278. This observation, Lord Wright thought, was the true basis of the doctrine of frustration.

<sup>3</sup> *Horlock v. Beal* [1916] 1 A.C. 486, 507. See also per Lord Cozens-Hardy, M.R., in *Metropolitan Water Board v. Dick, Kerr & Co.* [1917] 2 K.B. 1, 21, and per Branson, J., in *Court Line, Ltd. v. Dant & Russell Incorporated* (1939), 44 Com. Cas. 345, 352, a case of hostilities without a formal declaration of war.

of the early stages of a war, its duration never could be prophetically fixed, even approximately. It has already been decided in your Lordships' House in several instances that contracts whose performance is interrupted by war are terminated, because the duration of the interruption cannot be even approximately foretold, so that the word 'temporary' would in the result mean in most cases of this kind the duration of the war, which might be years."<sup>1</sup>

## V. MEANING OF WAR : COMMERCIAL CONTRACTS

The meaning, in a commercial contract, of the term "war" depends entirely upon the construction of the contract.

"This word is uncertain in its scope. Its ambit varies with the nature and provisions of the contract and the general circumstances of the case. The court must consider in each case the scope of its significance . . . In policies of insurance or charterparties a broad meaning is often to be given to the word."<sup>2</sup>

### 1. *A Particular War*

The defendant, by charterparty, had contracted to load a cargo at Odessa on board a ship, then to proceed from a British port; if, before the ship's arrival at Constantinople, "war" had commenced and continued, a cargo was to be loaded at a reduced rate. "War," in this charterparty, meant war between Russia and Great Britain, not war between Russia and Turkey : *Avery v. Bowden*.<sup>3</sup>

"The word 'war' means such a war as would render the voyage of an *English* ship from *Constantinople* to *Odessa* unlawful, and without this clause would have dissolved the contract. It cannot extend to any war in any part of the world . . ."<sup>4</sup>

### 2. *A Local War*

Where, by a contract made before the war of 1914, a British firm agreed to sell to an Austrian firm iron ore in equal quantities over two years, and the contract contained a suspension clause in case, *inter alia*, of stoppage of mines or works or of loss or delay during transit owing to accidents, strikes, lock-outs, *wars*, civil commotions . . . , "this clause did not extend to a direct war between Austria and the United Kingdom. The scope was "strictly limited"; the disturbances indicated by the clause were "local" : *The Naylor, Benzon Case*.<sup>5</sup>

<sup>1</sup> *Attorney-General v. De Keyser's Royal Hotel, Ltd.* [1920] A.C. 508.

<sup>2</sup> *Naylor, Benzon & Co v. Krainsche Industrie Gesellschaft* [1918] 1 K.B. 331, 335, *per* McCardie, J.

<sup>3</sup> (1855), 5 El. & Bl. 714.

<sup>4</sup> *Ib.*, 724, *per* Lord Campbell, C.J.

<sup>5</sup> [1918] 1 K.B. 331.

"War effects a supreme administrative intervention. It precludes all intercourse between the parties. It results in extreme consequences. Such a war, I am satisfied, was quite beyond the contemplation of the parties and quite outside the scope of this suspension clause."<sup>1</sup>

### 3. "To the Captain of a Tramp Steamer"

Where, by a charterparty, charterers and owners may cancel the contract upon the occurrence of "war" involving the country of the charterers, "war" must be construed not in a technical, but in a common-sense way: "war" may exist without a declaration of war, and includes military operations or armed conflict undertaken or occurring *animo belligerendi*: *The Kawasaki Case*.<sup>2</sup>

By a charterparty made in 1936 and containing the above clause, the owners let a steamer to Japanese charterers. On 18th September, 1937, the owners gave the charterers notice cancelling the charter on the ground that "war," involving Japan, had broken out. The charterers contended that cancellation was wrongful and claimed damages.

At the arbitration it was conceded that extensive fighting between the armies of China and Japan had taken place, but the charterers argued that these countries were not "at war" because (*inter alia*) no declaration of war had been made; diplomatic relations had not been severed; the British Government had not recognised the existence of a state of war; neither of the States had an *animus belligerendi*. The owners contended that "war" must be given its natural meaning.

The Umpire (Sir Robert Aske, K.C.) found that before 18th September, Japan intended to drive the Chinese armies out of Northern China and to enforce her policy on the Government of China, that China intended to resist and to oppose any control by Japan; and that military operations were undertaken by both countries *animo belligerendi*. Those operations constituted a "war" in the ordinary meaning of that term.<sup>3</sup> Subject to the opinion of the court, he awarded that the charterers were not entitled to recover damages.

<sup>1</sup> [1918] 1 K.B., at 336, *per* McCardie, J. Compare *The Badische Case* [1921] 2 Ch. 331, 375, *per* Russell, J.

<sup>2</sup> [1939] 2 K.B. 544, affirming the judgment of Goddard, J. (1938), 61 Ll. L. Rep. 131.

Compare *Court Line, Ltd. v. Dant & Russell, Incorporated* (1939), 44 Com. Cas. 345, 352, *per* Branson, J., upon "an act of hostilities which are being carried on without a formal declaration of war."

<sup>3</sup> The umpire's findings are stated in (1938), 61 Ll. L. Rep., at 132-135. Three Japanese armies had invaded North China, in the teeth of the opposition of Chinese armies. Fifty battles had been fought between August and December: a naval blockade had been maintained. But "war" had not been declared and diplomatic relations had not been broken off.

Goddard, J. (as he then was), after referring to the definition of "war," quoted by Mathew, J., from Hall on *International Law*,<sup>1</sup> said that it was—

"difficult to understand how any ordinary person could regard this state of affairs as other than involving war."<sup>2</sup>

The Foreign Office had stated that the situation was "indeterminate and anomalous," and that the Government were not prepared to say that a state of war existed; upon the meaning of the term in a charterparty, however, their attitude might not be conclusive. The question, said Goddard, J., was "what the parties meant by this clause." They used the word "war" "in the sense in which an ordinary commercial man would use it, or, if one may put it, as the captain of a tramp steamer would interpret it. I do not think the parties in a case of this sort are going into the niceties of international law." The parties meant that "if there was a state of conflict going on, not a revolution or a civil conflict . . . that would justify the breaking off of the contract."<sup>3</sup> Business men are not concerned with "the extraordinarily nice distinctions" drawn by great international lawyers between "reprisals, armed intervention, peaceful penetration and war." The rule of construction was that which Pickford, J., had applied in construing the meaning of "piracy."

"One has to look at what is the natural and clear meaning of the word 'pirate' in a document used by business men for business purposes. . . . Piracy in a policy of marine insurance means piracy in what is called by Hall its coarser sense."<sup>4</sup>

The appeal was dismissed. The words "if war breaks out" cannot mean "if war is recognised to have broken out by His Majesty's Government."

"Nobody would have the temerity to suggest in these days that war cannot exist without a declaration of war."<sup>5</sup>

The severance of diplomatic relations was not an essential element.

"To suggest that, within the meaning of this charterparty, war had not broken out involving Japan on the relevant date is to attribute to the parties a desire to import into their contract some obscure and uncertain technicalities of international law rather than the common sense of business men."<sup>6</sup>

<sup>1</sup> In *Driefontein Consolidated Gold Mines, Ltd. v. Janson* [1900] 2 Q.B. 339, 343. The source of the quotation is Hall, 4th ed., 63.

<sup>2</sup> (1938), 61 Ll. L. Rep., at 137.

<sup>3</sup> *Ib.*, at 138.

<sup>4</sup> *Republic of Bolivia v. Indemnity Mutual Marine Assurance Company, Ltd.* [1909] 1 K.B. 785, 790, 792; approved by the Court of Appeal. (The passages referred to in Hall were in the 5th ed., at 259, 262.)

<sup>5</sup> [1939] 2 K.B., at 556, per Sir Wilfrid Greene, M.R.

<sup>6</sup> *Ib.*, at 559.



## VI. TERMINATION OF WAR

"In every community," said Lord Macnaghten, "it must be for the supreme power, whatever it is, to determine the policy of the community in regard to peace and war."<sup>1</sup>

The end of the war of 1914 was declared by Order in Council, made under the authority of and as provided by statute.<sup>2</sup>

The "termination of war" is not equivalent to the "cessation of hostilities." War does not cease upon an "armistice"<sup>3</sup>; even a treaty of peace requires ratification.<sup>4</sup> Treaties with different countries may be signed upon different dates<sup>5</sup>; all these the general end of a war must take into account. Finally, a contract<sup>6</sup> or a clause in a will<sup>7</sup> or a lease<sup>8</sup> expressed to be "for the duration of the war" or "until the termination of the war" may, upon its true construction, refer to a period earlier than the official end of the war: so it was held under the Act of 1918. For the purposes of a *war-time lease*, the "duration of the war" has now been defined<sup>9</sup>; no statutory definition has yet been given for any other purposes.

### 1. *Between Armistice and Treaty*

An armistice is an agreement for "a temporary cessation of hostilities, either for a stipulated period, or for an indefinite period terminable upon notice. It connotes neither peace nor temporary peace."<sup>10</sup>

<sup>1</sup> *Janson's Case* [1902] A.C. 484, 497. See also *The Hoop* (1799), 1 C. Rob. 196, 199, per Sir William Scott: Oppenheim, *op. cit.*, 478; *McNair*, 5. 6.

<sup>2</sup> Termination of the Present War (Definition) Act, 1918, s. 1 (1).

<sup>3</sup> *The Rannveig* [1920] P. 177; [1922] A.C. 97, 104, *infra*, 21.

<sup>4</sup> *The Eliza Ann* (1813), 1 Dod. 244, 248, *infra*; *Kotzius v. Tyser* [1920] 2 K.B. 69, *infra*, 23, 24.

<sup>5</sup> See note 1, *infra*, p. 22.

<sup>6</sup> *Ruffy-Arnell & Co. v. R.* [1922] 1 K.B. 599, 613.

<sup>7</sup> *In re Rawson* (1920), 90 L.J. Ch. 304, 305.

<sup>8</sup> *Great Northern Railway Co. v. Arnold* (1916), 33 T.L.R. 114, 115. See also *Swift v. McBean* [1942] 1 K.B. 375, *infra*.

<sup>9</sup> Validation of War-Time Leases Act, 1944, s. 1 (2), *infra*, 33, 34.

<sup>10</sup> Oppenheim, *op. cit.*, 433 *et seq.*

In *Hain Steamship Company v. Board of Trade* [1928] 2 K.B. 534, 543, Scrutton, L.J., said: "the armistice did not suspend operations of war: the blockade continued, and any German ships at sea were liable to capture; vessels carrying contraband were captured and condemned by the Prize Court. The state of active war might have revived in full severity." Thus also, Greer, L.J.: "It is clear from the terms of the armistice that it did not put an end to all warlike operations . . . The armistice only operated as a suspension of certain acts of hostility and did not put an end to the war or render it impossible for warlike operations to continue" (*ib.*, at 553). And in the House of Lords, Viscount Sumner observed: "Though the Armistice had been signed and, having been renewed, war was still current, war was not over, nor was the renewal of war by any means out of the question" (*Board of Trade v. Hain Steamship Company* [1929] A.C. 534, 539).

For termination of wars in modern history, see Charles C. Tansill, *Termination of War by Mere Cessation of Hostilities* (1922), 38 L.Q.R. 26-37.

Thus, an agreement made in April, 1918, between the United States of America and Norway, and assented to by Great Britain, did not amount to a licence to Norway to export fish free from the belligerent right of capture. In March, 1919, a Norwegian vessel bound from a Norwegian port to Stettin, with cargo, owned by a German company, was captured by a British warship. Both vessel and cargo were put in prize. The armistice, it was held, did not give Germany the right to import foodstuffs to her bases. The cargo was contraband and the ship was subject to condemnation: *The Rannveig*. "The armistice was an armistice only," said Lord Sumner, "and quite consistent with the maintenance of the German organisations in view of a possible renewal of hostilities."<sup>1</sup>

## 2. When Treaty Binding

A treaty of peace, although it is signed by plenipotentiaries, in the absence of any clause to the contrary does not become binding until it is ratified.<sup>2</sup>

Said Sir William Scott—

"A subsequent ratification is essentially necessary. The ratification may be a form, but it is an essential form; for the instrument, in point of legal efficacy, is imperfect without it. I need not add, that a ratification by one power alone is insufficient; and, if necessary at all, it must be mutual; and that the treaty is incomplete till it has been reciprocally ratified."<sup>3</sup>

## 3. End of War of 1914

On 11th November, 1918, hostilities between the Allies and Associated Powers and Germany and Austria-Hungary had ceased; an armistice for thirty-six days was granted to Germany; on 14th December, 1918, it was renewed. On 18th January,

<sup>1</sup> [1920] P. 177 (In Prize) [1922] 1 A.C. 97, 104. On the other hand, on 11th November, 1918, the President of the United States of America read a proclamation to Congress that an armistice had been signed, including a statement that "The war thus comes to an end." It was held in *United States v. Hicks* (1919), 256 Fed. 701, 707, *Annual Digest*, 1919-1922, Case No. 308, that the war was "in fact ended." See, however, Cases Nos. 301-306.

By "the war," however, the President must have meant "hostilities." See Manley O. Hudson, *The Duration of the War between the United States and Germany* (1926), 39 Harv. L. Rev. 1020-1045, at 1029, 1030.

<sup>2</sup> For the termination of war by mere cessation of hostilities, see (1922), 38 L.Q.R. 26-27 (Charles S. Tansill); Oppenheim, *op. cit.*, 468, 469.

<sup>3</sup> *The Eliza Ann* (1813), 1 Dod. 244, 248. See, however, Oppenheim, *op. cit.* 478: "Unless the treaty provides otherwise, peace commences with the signing of the peace treaty. An unratified peace treaty is considered as an armistice, and, should it not be ratified, hostilities may be recommenced."

1919, the Peace Conference opened and the Treaty of Peace with Germany was signed on 28th June, 1919.<sup>1</sup>

By the Termination of the Present War (Definition) Act, 1918, His Majesty in Council was empowered to declare the date to be treated as the date of the termination of the war for the purpose of any provision in any statute, Order in Council or proclamation,

“and, except where the context otherwise requires, of any provision in any contract, deed, or other instrument, referring, expressly or impliedly, and in whatever form of words, to the present war or the present hostilities.”<sup>2</sup>

The date so declared was to be “as nearly as may be the date of the exchange or deposit of ratifications of the treaty or treaties of peace,” and was to be conclusive for all purposes of the Act.<sup>3</sup> A date might be similarly declared as the date of termination of the war between His Majesty and any particular State.<sup>4</sup>

An Order in Council was made declaring the date of the termination of the war with Germany to be 10th January, 1920, when the Treaty of Versailles was ratified. The date of the termination of the whole war was declared, by Order in Council, to be 31st August, 1921.<sup>5</sup>

The “end of the war” is defined in the Trading with the Enemy Act of the United States, as :—

“the date of proclamation of exchange of ratifications of the Treaty of Peace, unless the President shall, by proclamation, declare a prior date, in which case the date so proclaimed shall be deemed to be the ‘end of the war’ within the meaning of this Act.”<sup>6</sup>

<sup>1</sup> The treaty of peace with Austria came into force on 16th July, 1920, that with Bulgaria, on 9th August, 1920; that with Hungary, on 26th July, 1921. The Treaty of Peace with Turkey, signed on 10th August, 1920, was not ratified. It was replaced by the Treaty of Lausanne, signed on 24th July, 1923, which came into force on 6th August, 1924. (Cited from Oppenheim, *op. cit.*, 473, Note 1.)

<sup>2</sup> Section 1 (1). See Trotter, 204.

In 1943 the Home Secretary stated that “there is an obligation on the Government at the end of the war to bring in legislation to define when the war has finished for legal purposes (*Official Report*, vol. 391, col. 506).

<sup>3</sup> Section 1 (2).

<sup>4</sup> Section 1 (1).

<sup>5</sup> *London Gazette*, 12th August, 1921.

In *R. v. Governor of Wormwood Scrubs* [1920] 2 K.B. 305. the Divisional Court refused a writ of *Habeas Corpus* to a man, born in Dublin, who had been arrested and interned in January, 1920, under reg. 14B. The “military emergency” was held to continue until it had been expressly ended by proclamation. “The war is not at an end,” said Earl of Reading, C.J. (at 312).

<sup>6</sup> Text, Domke, 386.

#### 4. *Between Treaty and Ratification*

Between the date of a treaty of peace and the date when the ratifications are deposited, a state of war continues to exist and peace has not been concluded : *Kotzias v. Tyser*.<sup>1</sup>

A Greek merchant, prevented by war from continuing his business, took out a policy of insurance on 2nd November, 1918, for the sum of £3,400 "in the event of peace between Great Britain and Germany not being concluded on or before 30th June, 1919." On 28th June, 1919, the Treaty of Versailles was signed. By the preamble : "From the coming into force of the present Treaty the state of war will terminate." By art. 440 the treaty was to be ratified : the deposit of ratifications was to be made at Paris as soon as possible. A *first procès-verbal* of the deposit of ratifications would be drawn up as soon as the treaty had been ratified by Germany and by three of the principal Allied and Associated Powers ; from the date of that *procès-verbal* the treaty would come into force between the High Contracting Parties who had ratified it. On 1st July, 1919, His Majesty issued a proclamation which provided that the treaty (therein described as "definitive") should be published throughout His Dominions, and that upon the exchange of ratifications the treaty should be "observed inviolably as well by sea as by land and in all places whatsoever." On 31st July, 1919, the Treaty of Peace Act, 1919, was passed.

In August, 1919, on the ground that peace had not been concluded by 30th June, 1919, the plaintiff issued a writ upon the policy. Not until 10th January, 1920, were ratifications exchanged by the signatory powers. No Order in Council under the Act of 1918, declaring a date, had yet been made.

Roche, J., held that peace had not been concluded on or before 30th June, 1919, and that the plaintiff was entitled to recover on the policy.

*First*, "in the absence of any specific statutory or contractual provision to the contrary, the general rule of international law is that as between civilised powers who have been at war, peace is not concluded until a treaty of peace is finally binding upon the belligerents, and that that stage is not reached until ratifications of the treaty of peace have been exchanged between them."<sup>2</sup>

*Secondly*, the Act of 1918 contemplated that an Order in Council or a proclamation would be issued declaring the date of the termination of hostilities and the conclusion of peace : the termination of war and the conclusion of peace referred to the same date. No Order in Council or proclamation had yet been issued.

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<sup>1</sup> [1920] 2 K.B. 69.

<sup>2</sup> *Ib.*, 77.

*Thirdly*, art. 440 of the Treaty of Versailles provided that the treaty would come into force, i.e., peace would be concluded, by a deposit of ratifications, a *procès-verbal* thereof; this was not done until January, 1920. No special meaning could be given to the words in the policy because the plaintiff was a man of business and was insuring himself against a business risk.<sup>1</sup>

This decision was followed by Sankey, J. (as he then was), in *Lloyd v. Bowring*.<sup>2</sup>

A contract to pay money "six months from the date of the signing of peace between Great Britain and Germany" was construed as referring not to the date when the treaty of peace was signed, i.e., on 28th June, 1919, but to 10th January, 1920, the date fixed by Order in Council as the date of the end of the war: *Rattray v. Holden*.<sup>3</sup>

#### 5. Where "Context" otherwise requires

##### (a) In a Contract

Where, in the context "of the whole of the contract," "having regard to the nature, object and terms of the contract," the parties could not have intended the contractual obligations to continue until the official termination of the war in August, 1921, the court held that the parties contemplated as "the duration of the war." "the substantial continuance of active hostilities," i.e., until 14th December, 1918: *Ruffy-Arnell & Co. v. R*.<sup>4</sup>

In 1916 the War Office made a contract with the suppliants (who carried on an aviation school at Hendon), "as a temporary measure and for the duration of the war," to train pupils for flying. The War Office had the right to decide upon the efficiency of the school. In 1917 the suppliants removed to Acton, erected substantial buildings and enlarged their operations; the War Office increased the numbers of pupils. In March, 1918, the Air Council took over the powers and duties of the War Office, and on 24th June, purporting to act under a notice clause, wrote determining the agreement as from 1st July, 1918. The suppliants brought a petition of right, saying that they were ready to perform their contract for the full term, viz., "the duration of the war." They claimed loss of profit for the duration of the war at the rate of £40,000 per annum.

McCardie, J., held that the Crown had committed a breach of contract. In June and July, 1918, the war was "in full and

<sup>1</sup> [1920] 2 K.B., at 79.

<sup>2</sup> (1920), 36 T.L.R. 397. The underwriters there bound themselves to pay "If peace is not declared . . . on or before 30th June, 1919."

<sup>3</sup> (1920), 36 T.L.R. 798, 799, *per* Darling, J.

<sup>4</sup> [1922] 1 K.B. 599, 613, *per* McCardie, J.

unparalleled progress." The contract contained no power to determine, but only a discretion as to the capacity of the school and the number of pupils to be allotted. "*Prima facie*," said the learned judge, "the war lasted till August, 1921." The question was complicated by the "number and inter-connection of warring nations."<sup>1</sup> The word "context" in the Act of 1918 means "the context of the whole of the contract"; "the whole provisions of the bargain" must be considered.<sup>2</sup> Lord Halsbury in *Glynn v. Margetson & Co.* had said<sup>3</sup>: "A business sense will be given to business documents." And this, of Mellish, L.J., in *The Teutonia*: "Although it is true that the court ought not to make a contract for the parties which they have not made themselves, yet a mercantile contract, which is usually expressed shortly, and leaves much to be understood, ought to be construed fairly and liberally for the purpose of carrying out the object of the parties."<sup>4</sup> The parties here could not have intended that the obligations of the Government "having regard to the nature, object and terms of the contract" should continue until August, 1921. The "proper and just date" was 14th December, 1918.

"The parties here were contemplating as 'the duration of the war' the substantial continuance of active hostilities."<sup>2</sup>

The learned judge held that as from 1st July the Government decision not to send more pupils was *bona fide* and based on good grounds. The suppliants were entitled to general damages only "for the general inconvenience, trouble and expense caused by the Crown's breach of contract in so abrupt a manner."<sup>2</sup>

### (b) *In a Will*

Upon the true construction in a will, of a trust for the accumulation of interest on a legacy, the "termination of the present war" meant the termination of the war with Germany not of the war generally: *In re Rawson*.<sup>5</sup>

A testator, who died in 1917, bequeathed a legacy to his son, directing his trustees to accumulate the interest "until six months after the declaration of peace terminating the present war or the expiration of twenty-six years from my death whichever shall be the shorter period." If his son did not return and claim the legacy within that period, legacy and accumulations should fall into residue. His son was reported missing or killed at Loos in September, 1915. In construing the will, said

<sup>1</sup> [1922] 1 K.B., at 612. Grotius was cited: "*Sic ergo, ut et Gellius dixit, non pax est induciæ: bellum enim manet, pugna cessat*" (lib. 3, cap. xxi, para. 2).

<sup>2</sup> [1922] 1 K.B. 599, at 613.

<sup>3</sup> [1893] A.C. 351, 359.

<sup>4</sup> (1872), L.R. 4 P.C. 171, 182.

<sup>5</sup> (1920), 90 L.J. Ch. 304.

Eve, J., "regard must be had to the paramount consideration which he (*sc.* the testator) had in his mind." The will was made eighteen months after the disappearance of his son ; the father had hope that the son was yet living.

"The conclusion is almost irresistible that he was considering only the state of war between this country and Germany, and that when he speaks of peace terminating the present war, he means the war between His Majesty and that country, and not the war generally."<sup>1</sup>

## VII. TERMINATION OF "THE PRESENT EMERGENCY"

On 3rd September, 1939, the present war began. On 24th August, 1939, however, the Emergency Powers (Defence) Act, 1939, was passed, conferring power to make "Defence Regulations" by Order in Council, "in the present emergency," as appear to be necessary or expedient for five purposes :—

(a) the public safety ; (b) the defence of the realm ; (c) the maintenance of public order ; (d) effective prosecution of any war in which His Majesty may be engaged ; (e) the maintenance of supplies and services essential to the life of the community.<sup>2</sup>

The Act was to continue in force for one year from its passing, and then to expire.<sup>3</sup> Upon an address by each House of Parliament, its operation might be continued for a year, from year to year.<sup>4</sup> For the term "one year," "two years" was substituted by the Emergency Powers (Defence) Act, 1940<sup>5</sup> ; the Act has since continued in force by Order in Council.<sup>6</sup> The "emergency" will end when

"His Majesty by Order in Council declares that the emergency that was the occasion of the passing of this Act has come to an end."

Upon the end of the day on which the order comes into force, the Act will expire.<sup>7</sup>

The period of "the emergency" is not coterminous with the period of the "war."<sup>8</sup>

<sup>1</sup> (1920), 90 L.J. Ch., at 305.

<sup>2</sup> Preamble ; s. 1 (1). These powers were extended, by the Emergency Powers (Defence) Act, 1940, to provide for requiring persons "to place themselves, their services, and their property at the disposal of His Majesty, as appear to him to be necessary or expedient" for the above purposes.

<sup>3</sup> Section 11 (1).

<sup>4</sup> Proviso to s. 11 (1).

<sup>5</sup> Section 1 (3).

<sup>6</sup> S.R. & O. (1941), No. 1086 ; S.R. & O. (1942), No. 1542 ; S.R. & O. (1943), No. 1036 ; S.R. & O. (1944), No. 931.

<sup>7</sup> Emergency Powers (Defence) Act, 1939, s. 11 (2).

<sup>8</sup> But see *Official Report*, vol. 402, col. 586, where the Lord President of the Council said that the National Service Acts would operate "throughout the present emergency, which will not end until after the defeat of both Germany and Japan."

It is interesting to note that "war period" is defined in the Restoration of Pre-War Trade Practices Act, 1942, as "the period beginning with the third day of September, nineteen hundred and thirty-nine and ending with such date as the Minister [*sc.* of Labour and National Service] may by order appoint, not being later than the date on which the Emergency Powers (Defence) Act, 1939, expires."<sup>1</sup>

The Validation of War-Time Leases Act, 1944, provides that His Majesty may, by Order in Council, declare what date is to be treated *for the purposes of any tenancy agreement* as the date of the end of the war and of hostilities (whether as respects all enemy States or any particular enemy State), and of the emergency (not defined by reference to any Act of Parliament).<sup>2</sup>

### VIII. LEASE FOR "DURATION OF THE WAR"

#### 1. *Invald at Common Law.*

The normal method of defining in a lease a term for the duration of the war, or until the termination of hostilities, is to provide for a fixed term of years, determinable on the end of the war. "For regularly in every lease for yeares the terme must have a certaine beginning and a certaine end; and herewith agreeeth *Bracton, terminus annorum certus debet esse et determinatus,*" says Coke.<sup>3</sup> "Albeit," he continues, "there appeare no certainty of yeares in the lease, yet if by reference to a certainty it may be made certaine it sufficeth, *Quia id certum est quod certum reddi potest.*" Thus, where A leases his land to B for as many years as B has in the manor of *Dale*, and B has then a term of ten years, this is a good lease. On the other hand, if the parson of D leases his glebe for as many years as he shall be parson there, "this cannot be made certaine by any meanes, for nothing is more uncertain than the time of death." Thus, also Sheppard.<sup>4</sup> He opined, however, that in cases of uncertain leases, if livery of seisin were made upon them [or if there were a deed], "they may be good leases for life determinable on these contingents, albeit they be no good leases for years."<sup>5</sup>

<sup>1</sup> Section 11 (1). See also the definition of "short tenancy" in the War Damage Act, 1943, s. 123 (1), (a) war, (b) hostilities, distinguishing (c) "the emergency." Compare Requisitioned Land and War Works Bill, s. 52 (1), "War period."

<sup>2</sup> Section 2 (2). "Tenancy agreement" is defined in subs. (3). For the full terms of the section, see *infra*, 35.

<sup>3</sup> Coke on Littleton, 45b.

<sup>4</sup> *Touchstone*, vol. II, 274: "But if A make a lease of land to B for so many years as the land B hath in execution shall be in execution, this lease is void for uncertainty."

<sup>5</sup> *Ib.*, 275.



Blackstone is more explicit :—

“ Every estate which must expire at a period certain and prefixed, by whatever words created, is an estate for years. And therefore the estate is frequently called a term, *terminus*, because its duration or continuance is bounded, limited and determined ; for every such estate must have a certain beginning, and certain end. But *id certum est quod certum reddi potest* : therefore, if a man make a lease to another, for so many years as J S shall name, it is a good lease for years ; for though it is at present uncertain, yet when J S has named the years, it is then reduced to a certainty.”<sup>1</sup>

On the other hand, a lease for as many years as J S shall live is void from the beginning :

“ for it is neither certain, nor can ever be reduced to a certainty, during the continuance of the lease.”

Thus, also, the lease by the parson of the glebe for as many years as he shall continue parson is “ still more uncertain.” But a lease for twenty years if J S shall so long live, is good :

“ for there is a certain period fixed, beyond which it cannot last ; though it may determine sooner on the death of J S . . . ”<sup>2</sup>

Thus, certainty in the term must be ascertained, or capable of being ascertained, *before* the lease takes effect. A lease “ for the duration of the war,” or “ until the termination of hostilities,” does not, at common law, create a legal term of years.

And so in *Lace v. Chantler*,<sup>3</sup> the Court of Appeal held. Lord Greene, M.R., cited a passage from Foa on *Landlord and Tenant*,<sup>4</sup> as correctly stating the law :—

“ The habendum in a lease must point out the period during which the enjoyment of the premises is to be had ; so that the duration, as well as the commencement of the term, must be stated. The certainty of a lease as to its continuance must be ascertainable either by the express limitation of the parties at the time the lease is made, or by reference to some collateral act which may, with equal certainty, measure the continuance of it, otherwise it is void. If the term be fixed by reference to some collateral matter, such matter must either be itself certain (e.g., a demise to hold for ‘ as many years as A has in the manor of B ’) or

<sup>1</sup> *The Commentaries* (1876), ed. Kerr, vol. II, 122.

<sup>2</sup> See also Woodfall, *Law of Landlord and Tenant* (1939), 24th ed., 219 *et seq.* : Hill, *Complete Law of Landlord and Tenant* (1939), 33 *et seq.*

<sup>3</sup> [1944] 1 K.B. 368. Compare *Stannmeyer v. Davis* (1941), 321 Ill. App. 227, cited 39 Illinois L. Rev. (1944), 85–88.

<sup>4</sup> 6th ed., 115, cited *ib.*, at 370, 371.

capable before the lease takes effect of being rendered so (e.g., for 'as many years as C shall name')."

"The important words to observe in that last phrase," said Lord Greene, "are the words 'before the lease takes effect.'" The passage cited continues:—

"Consequently, a lease to endure for 'as many years as A shall live,' or 'as the coverture between B and C shall continue,' would not be good as a lease for years, although the same results may be achieved in another way by making the demise for a fixed number (ninety-nine for instance) of years determinable upon A's death, or the dissolution of the coverture between B and C."

This—subject to the Validation of War-Time Leases Act, 1944<sup>1</sup>—remains the law. That statute does not apply where *before 13th June, 1944*, the landlord or the tenant has given a notice in writing to put an end to the relationship of landlord and tenant.<sup>2</sup> Nor does the statute revive an agreement terminated by mutual consent before the Act was passed.<sup>3</sup>

## 2. Judicial Attempt to Validate

(a) In *Great Northern Railway Company v. Arnold*,<sup>4</sup> where parties had made an agreement of tenancy "for the period of the war," Rowlatt, J., treated this as a valid agreement as if the period were a fixed term of years determinable on the end of the war. Both parties, he declared, clearly intended that the defendant should have the premises for the period of the war.

"If a lease for 999 years had been made, terminable with the conclusion of the war, it would have been perfectly good as a tenancy . . . By hook or by crook the defendant should have what he bargained for."

Upon which MacKinnon, L.J., in *Lace v. Chantler*,<sup>5</sup> observed:—

"'by hook or by crook' rather than on legal principles."

This case, Lord Greene, M.R., thought, could only be supported because there was a definite undertaking by the landlords not to serve a notice to quit during the period.<sup>6</sup> Thus it ceases to be authority for any contention that at common law a lease for the duration of the war is valid. Only by statute has it been possible "to effectuate the intention of the parties."

<sup>1</sup> *Infra*, 32 36.

<sup>2</sup> Section 3 (1) (b), *infra*, 36.

<sup>3</sup> Section 3 (1) (a), *infra*, 36.

<sup>4</sup> (1916), 33 T.L.R. 114, 115. Bacon's *Abridgment*, vol 4, 436, was cited in argument, and Sheppard's *Touchstone*, vol. 2, 274.

<sup>5</sup> [1944] 1 K.B. 368, 370.

<sup>6</sup> *Id.*, 371. For an illuminating comment on *The Great Northern Case*, see the judgment of His Hon. Judge Gordon Alchin in *Broadway v. Gibson* (1922), 9 L.J.N.C.C.R. 157, 160, 161.

(b) In *Swift v. Macbean*,<sup>1</sup> Birkett, J., appears to have accepted by implication, the reasoning of Rowlatt, J., in *The Great Northern Case*. An agreement for the tenancy of a furnished house made before the outbreak of war, to begin with the outbreak of war (if it should occur), and to end on the date on which hostilities ceased, was held not to be void for uncertainty.

On 30th August, 1939, Swift, in consideration of £5, had agreed to let to Macbean for three guineas a week, payable in advance, his furnished house "in the event of war being declared by Great Britain against any Power or State during the period of one year from the date of the agreement for a period beginning on the date of such declaration of war (but not before 16th September, 1939), and ending on the date on which hostilities ceased." After the outbreak of war, Macbean took possession. Later, he sub-let with consent. The sub-tenants left in March, 1941, and a requisition notice was served upon the plaintiff, taking possession of the house and the chattels under Defence (General) Regulations, 1939, regs. 51 and 53. The defendant declined to pay rent for premises which he could not occupy. The compensation under the Compensation (Defence) Act, 1939, was £25 a year; the contractual rent was £163 16s.

Birkett, J., held that the doctrine of frustration did not apply; for this purpose there was no distinction between furnished and unfurnished premises; the defendant was liable for the rent. He was not sure that the decision in the *Great Northern Case* was in point, but "the agreement in that case was held not to be void for uncertainty and did not create a mere weekly tenancy or tenancy at will. I find myself unable to hold that because this agreement is expressed to be for the period of time ending with the cessation of hostilities, it is, therefore, outside the decision in *London & North Eastern Estates Co. v. Schlesinger* [1916] 1 K.B. 20, and *Whitehall Court, Ltd. v. Ettlinger* [1920] 1 K.B. 680." The existence of a valid lease, i.e., not void for uncertainty was essential to Birkett, J.'s decision, which, in view of *Lace v. Chantler*, must be regarded as doubtful.

### 3. Licence for Duration of War.

In *Booker v. Palmer*,<sup>2</sup> Mrs. P's house was destroyed by a bomb, and Mrs. G, on P's behalf, approached a landowner who had two empty cottages available. He allowed P and her mother to occupy one of these cottages: "I said they were welcome to it for the duration of the war, rent free." Later, the County Agricultural Committee ordered that certain fields belonging to the landowner should be cultivated and he granted B a lease of 120 acres, comprising the cottages and providing

<sup>1</sup> [1942] 1 K.B. 375.

<sup>2</sup> (1942), 2 All E.R. 674, 677. See *Note* (1943), 59 L.Q.R. 213.

that the landowner should be under no liability or duty to give vacant possession. B, requiring the cottage to accommodate a labourer, demanded possession from P.

Lord Greene, M.R., said that there was no evidence upon which a tenancy could be inferred: "The law does not impute intention to enter into legal relationships where the circumstances and the conduct of the parties negative any intention of the kind." It was merely a "charitable intention" to permit evacuees to stay in a cottage for the duration of the war—"the act of a good and charitable citizen towards people in distress." P was intended to be there as licensee, merely.

"No doubt the intention and the promise were that she should be left undisturbed for the duration of the war; but the fact that a licence is granted for a stated term does not prevent the licensor revoking that licence at any time, subject to certain well-known exceptions . . ."

#### 4. *Lace v. Chantler*

A tenancy for "the duration of the war" does not create at common law a good leasehold interest, nor can it be construed either as an agreement for a life tenancy terminable at the end of the war or as an agreement to grant a licence: *Lace v. Chantler*.<sup>2</sup>

L, the weekly tenant of a dwelling-house, sub-let to C. The agreement was partly oral and partly by conditions in the rent book, one of which said: "furnished for duration." Saying that C had wrongly removed certain articles, L gave him notice to quit and successfully brought an action for possession.

It was contended, *first*, that although the duration could not be fixed in advance, there was a valid letting for the duration of the war; *secondly*, and alternatively, that the tenancy could be regarded as a lease for ninety-nine years determinable on the cessation of the war; *thirdly*, in the further alternative, that the agreement might be regarded as a licence.

Lord Greene, M.R., said:—

"A term created by a leasehold tenancy agreement must be expressed either with certainty and specifically or by reference to something which can, at the time when the lease takes effect, be looked to as a certain ascertainment of what the term is meant to be."<sup>3</sup>

<sup>1</sup> The power to revoke a licence depends upon "all the relevant circumstances of the case": *per* Lord Greene, M.R., in *Minister of Health v. Bellotti* [1944] 1 K.B. 298, 304, quoting with approval a dictum of the Judicial Committee in *Canadian Pacific Railway Company v. R.* [1931] A.C. 414, 432.

In the *Bellotti* case (*ib.*, 308), MacKinnon, L.J., said: "I think the rule of law is that the licensor can revoke his licence at any time, but the licensee has thereafter a reasonable time having regard to all the circumstances, to comply with revocation."

<sup>2</sup> [1944] 1 K.B. 368, *per* Lord Greene, M.R., MacKinnon and Luxmoore, L.JJ. See *Note* (1944), 60 L.Q.R. 219, 220.

<sup>3</sup> [1944] 1 K.B., at 370.

Here, when the agreement took effect, the term was "completely uncertain." The fact that "at some future time it will be rendered certain" is insufficient to make it a good lease.

Nor could it be construed as a lease for a long period determinable on the cessation of the war. *The Great Northern Case*<sup>1</sup> could only be supported by the presence in the agreement of a definite undertaking by the landlord not to serve a notice to quit during the period.<sup>2</sup> Further, it was impossible to construe this agreement as an agreement for a life tenancy terminable at the end of the war.

Finally, an ineffective intention to create a tenancy cannot be treated as a valid agreement to grant a licence :

"That would be setting up a new bargain which neither of the parties ever intended to enter into. The relationship between the parties must be ascertained on the footing that the tenant was in occupation and was paying a weekly rent. Accordingly, it must be the relationship of weekly tenant and landlord and nothing else."<sup>3</sup>

#### 5. *Validation of War-Time Leases Act, 1944*

A considerable number of agreements for "the duration of the war," or for a similar period, had been entered into. The decision of the Court of Appeal that these agreements were void made it essential to introduce a Bill to give them validity so as to effectuate the intention of the parties.

On 13th June, 1944, the Attorney-General intimated the Government's intention to introduce such a Bill—this is the material date ; such agreements terminated by notice given before that date will not revive.

The Lord Chancellor (Viscount Simon, L.C.), moving in the House of Lords the second reading of the Validation of War-Time Leases Bill, 1944, declared :—

"It is undoubted law that an agreement to let premises for an uncertain period like 'the duration of the war' does not constitute a valid lease. The reason is that at the date when a lease takes effect the date of its termination must be known, or at any rate capable of ascertainment. That is plainly so when an agreement is made to let a house or other premises for a period such as 'the duration of the war.'"<sup>4</sup>

The main provision of the Bill (drafted after the report of a committee presided over by a High Court Judge) is that such agreements should take effect as agreements for a *tenancy of ten years* subject to the *right of either party to determine* the tenancy

<sup>1</sup> (1916), 33 T.L.R. 114, *supra*, 29.

<sup>2</sup> [1944] 1 K.B., at 371.

<sup>3</sup> *Ib.*, at 372.

<sup>4</sup> *Official Report*, vol. 132, 11th July, 1944, cols. 816-821, at 817.

by one month's notice if the war ends before ten years. The possible meanings of "*the duration of the war*" are defined: the term may mean the whole war, or the war with Germany; *prima facie*, it means the whole war, but each agreement must be construed as best it may. His Majesty may by Order in Council declare what date is to be treated, for the purpose of a tenancy agreement, as the date of the end of the war, or the end of hostilities—whether of the German war, or of the whole war.<sup>1</sup>

*Section 1.—Validation of tenancies for duration of the war*

An agreement made *before or after the Act was passed*, purporting to grant or provide for the grant of a tenancy for the duration of the war, will have effect as if it granted or provided for the grant of an *agreement for a tenancy for a term of ten years*, subject to the right of landlord or tenant, if the war ends before the expiration of that term, to determine the tenancy by at least one month's written notice given after the end of the war.<sup>2</sup>

There are three provisos:—

(a) if the agreement provides for *termination by notice before the war ends*, that provision will apply to the tenancy;

(b) if the agreement provides for termination *after the war ends*, that provision will apply, in substitution for the statutory provision;

(c) if the agreement relates to an *agricultural holding*, the subsection applies—the agreement will be effective—subject to Agricultural Holdings Act, 1923, ss. 23 and 25 (i.e., *twelve months'* notice is requisite to terminate at the end of the year of tenancy).<sup>3</sup>

"*Duration of the war*," in s. 1 means a period which, *on the proper construction* of the words used in the agreement *whatever they may be*, ends with, or within a specified time after, one of the following events:—

"(a) the end of the war or of hostilities as respects *all the States* with which His Majesty is at war and *all theatres of war*;

<sup>1</sup> *Official Report*, vol. 132, cols. 817, 818. See *infra*, 52, 53.

<sup>2</sup> Subsection (1). In Scotland, *forty days*, or, in the case of an agricultural tenancy, *six months* (s. 5, substituting a special s. 1 applying to Scotland). The Act does not apply to Northern Ireland which is given power to enact legislation for similar purposes (s. 6).

On the second reading in the House of Commons, the Attorney-General intimated that words had been used to keep such agreements as "*short tenancies*" within the meaning of the definition in War Damage Act, 1943, s. 123 (1) (*Official Report*, vol. 402, cols. 710-730, col. 711).

<sup>3</sup> Added by the House of Lords, in committee (*Official Report*, vol. 132, col. 1032).

(b) the end of the war or of hostilities as respects any particular State or States or any particular theatre or theatres of war ;

(c) the end of the *emergency* mentioned in the *Emergency Powers (Defence) Act, 1939*, or of the period for which that Act or any regulation, order or power thereunder is in force or of the emergency mentioned in any other Act of the present Parliament ;

(d) the end of the *emergency* (not defined by reference to any Act of Parliament) occasioned by the war or hostilities, whether as respects all the said States and all theatres of war or as respects any particular State or States or any particular theatre or theatres of war ;

(e) any event likely to occur on or in connection with any of the events aforesaid.”<sup>1</sup>

An agreement purporting to grant, or provide for the grant of a tenancy for the duration of the war, includes—

(a) an agreement purporting to grant, or provide for the grant of—

(i) a tenancy for a specified term or for the duration of the war, whichever is the shorter ; or

(ii) a tenancy for a specified term or for the duration of the war, whichever is the longer ; or

(iii) a tenancy to continue until determined by notice, subject to a condition that notice is not to be given before the end of the war ;

(b) an agreement between the vendor and purchaser of land that the vendor may retain possession for the duration of the war.

It does not include an agreement granting or providing for the grant of a tenancy for a specified term subject to the right of landlord or tenant to determine the tenancy, if the war ends before the expiration of the term, by notice after the end of the war.<sup>2</sup>

An agreement includes an agreement in the form of a lease.<sup>3</sup>

## Section 2.—Construction of Tenancy Agreements

Where a tenancy agreement uses the expression “the war,” or “hostilities,” or “the emergency,” or a similar expression, without indication whether it refers—

“(a) to the war or to hostilities as respects all the States with which His Majesty is at war and all theatres of war, or as the case may be, to the *emergency* occasioned thereby ; or

<sup>1</sup> Subsection (2).

<sup>2</sup> Subsection (3).

<sup>3</sup> Subsection (6).

(b) to the war or to hostilities as respects *any particular State or States or to any particular theatre or theatres of war, or, as the case may be, to the emergency occasioned thereby,*" the expression refers to the war or hostilities *as respects those States with which His Majesty was at war when the agreement was made*, or to the emergency occasioned thereby, unless it is proved that the parties intended another meaning.<sup>1</sup>

The court construing the agreement may admit "any evidence which in the opinion of the court may throw light on the intention of the parties as to the meaning of the said expression."<sup>2</sup>

His Majesty may, by *Order in Council*, declare what date is to be treated for the purposes of *any* tenancy agreement as

"(a) the date of the end of the war and of hostilities as respects all the said States and all theatres of war, and of the emergency (not being defined by reference to any Act of Parliament) occasioned thereby;

"(b) the date of the end of the war and of hostilities, as respects any particular State or States or any particular theatre or theatres of war and of the emergency (not being defined as aforesaid) occasioned thereby;

"(c) the date of any event which occurs, or which the parties considered likely to occur, on or in connection with the end of any such war, hostilities or emergency as aforesaid, and which appears to His Majesty to require definition for the purposes of tenancy agreements."<sup>3</sup>

Unless the context requires, or admissible evidence points to, a contrary construction, these dates will apply in the construction of *any* tenancy agreement.<sup>3</sup>

The expression "tenancy agreement," in this section, has a wider connotation than it has in s. 1 (1). It means—

"any lease or other agreement, whether entered into before or after the passing of this Act, creating a tenancy or varying any of the terms or conditions of a tenancy, and includes any such agreement as is referred to in subsection (1) of the foregoing section."<sup>4</sup>

<sup>1</sup> Subsection (1). The Bill as drawn had proposed that the expression would refer, *prima facie*, to the war as a whole and to hostilities as a whole. It was pointed out in the House of Commons that where such an agreement was made before December, 1941, the parties must have meant the war with Germany: the Japanese war had not begun (*Official Report*, vol. 402, cols. 718, 719, 721, 729, 730).

<sup>2</sup> This provision was inserted in committee to render admissible correspondence or negotiations between the parties (*ib.*, cols. 718, 719, 987, 988).

<sup>3</sup> Subsection (2). It may be argued that the ambit of "admissible evidence" is widened by the sentence at the end of subs. (1) so as to include "any evidence which in the opinion of the court may throw light on the intention of the parties as to the meaning of the said expression."

<sup>4</sup> Subsection (3).



*Section 3.—Savings*

Section 1 does *not* apply when—

(a) the relationship of landlord and tenant has terminated *before* the Act was passed otherwise than by notice given by either party *on or after 13th June, 1944* (the date when the Attorney-General announced the intention to introduce the Bill); *or*

(b) either party, before 13th June, 1944, has given a *written notice* which, but for s. 1, would determine the relationship; *or*

(c) the parties have *agreed*, before the Act was passed, to *determine* the agreement or to *substitute* for their existing agreement a *valid tenancy*.

Where a tenant retains possession only under the Rent and Mortgage Interest (Restrictions) Acts, 1920 to 1939, the relationship of landlord and tenant, for the purposes of s. 3, subs. (1), is deemed to have ended.<sup>1</sup>

Section 1 does not affect any provision in an agreement to which the section applies, which does not relate to the duration of the tenancy.<sup>2</sup> Nor does that section require any agreement to be executed in writing or under seal.<sup>3</sup>

*Section 4.—Application to the Crown*

The Act applies to agreements to which the Crown is a party. Thus the Crown will enjoy the benefit of the Act and will be bound by the Orders in Council made under it.<sup>4</sup>

*Section 7.—Interpretation*

Except where the context otherwise requires, “the war” and “hostilities” mean

“the war and hostilities in which His Majesty is engaged at the passing of this Act.”<sup>5</sup>

Subject to s. 3, the Act will be deemed to be incorporated in every relevant tenancy agreement from the date when that agreement was made.<sup>6</sup>

<sup>1</sup> Subsection (1). Upon the limited retroactivity of this subsection, see speech of Attorney-General in committee (*Official Report, House of Commons*, vol. 402, cols. 992-996).

<sup>2</sup> Subsection (3).

<sup>3</sup> Subsection (4). This clause was substituted in committee to make the original clause more accurate (*Official Report, House of Lords*, vol. 132, cols. 1034, 1035).

<sup>4</sup> *Official Report, House of Commons*, vol. 402, cols. 997, 998.

<sup>5</sup> Subsection (2).

<sup>6</sup> Subsection (3).

## CHAPTER II

### EMERGENCY POWERS: EFFECT ON CONTRACTS

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#### I. SCOPE OF EMERGENCY POWERS

To grasp the scope of the Emergency Powers which, during "the present emergency," have been conferred on His Majesty in Council, and to see how far decisions declaring *ultra vires* certain regulations made under the Defence of the Realm Consolidation Act, 1914, apply to Defence Regulations made under the Emergency Powers (Defence) Acts, 1939 and 1940, it is essential to compare the framework and the language of those charters of executive power. Judicial interpretation of one statute is no conclusive guide to the true meaning of another

statute which includes "different provisions" and is passed "in pursuance of different lines of thought."<sup>1</sup> Of two Revenue Acts, Lord Macnaghten observed: "The two Acts differ widely in their scope; and even where they happen to deal with the same subject the wording is not the same. It was argued, indeed, that the language was 'practically identical'; but that expression to my mind involves an assumption that the meaning is the same and an admission that the language is different."<sup>2</sup> Even the same words which in one statute are given a particular meaning, do not necessarily mean the same thing in another statute; "even in the same statute, the same word may be used in different senses at different places . . ."<sup>3</sup>

### 1. *Defence of the Realm Consolidation Act, 1914*

The Defence of the Realm Consolidation Act, 1914, empowered His Majesty in Council "during the continuance of the present war to issue regulations for securing the public safety and the defence of the realm, and as to the powers and duties for the purpose of the Admiralty and Army Council and of the members of His Majesty's forces and other persons acting on his behalf . . ."<sup>4</sup> Five express powers were conferred by regulation on the competent naval or military authority and any person duly authorised by him,

"where for the purpose of securing the public safety and the defence of the realm it is necessary so to do—

(a) to take possession of any land and to construct military works, . . . thereon, . . .;

(b) to take possession of any buildings or other property . . .;

(c) to take such steps as may be necessary for placing any buildings or structures in a state of defence;

(d) to cause any buildings or structures to be destroyed or any property to be moved from one place to another, or to be destroyed;

(e) to do any other act involving interference with private rights of property which is necessary for the purpose aforesaid.<sup>5</sup>

The purposes were limited to *two*, viz., "the public safety" and "the defence of the realm"; the powers could be exercised only where "for the purpose of securing the public safety, and

<sup>1</sup> Per Lord Halsbury, L.C., in *Knowles & Sons v. Lancashire & Yorkshire Railway Company* (1889), 14 A.C. 248, 253.

<sup>2</sup> *Inland Revenue Commissioners v. Forrest* (1890), 15 A.C. 334, 353.

<sup>3</sup> Per Lord Wright in *Liversidge v. Sir John Anderson* [1942] A.C. 206, 272, citing *Barnard v. Gorman* [1941] A.C. 378, 384, 385, 392, upon "offender" as the actual offender or the suspected offender.

<sup>4</sup> Section 1 (1).

<sup>5</sup> Defence of the Realm (Consolidation) Regulations, reg. 2.

the defence of the realm it is necessary so to do . . .” A regulation might provide for the suspension of restrictions imposed by existing statutory enactments.<sup>1</sup>

Despite these purposes, thus limited, those regulations impinged upon almost every branch of activity of individuals and of the State.<sup>2</sup>

## 2. *The Emergency Powers (Defence) Acts, 1939-1940*

The Emergency Powers (Defence) Act, 1939, exhibits two striking differences—one, in the amplitude of its purpose, the other, in the subjectivity of its language.

The Act empowers His Majesty in Council to make “Defence Regulations *as appear to him* to be necessary or expedient” for one or more of *five* purposes. The regulations may contain “such incidental and supplementary provisions as appear to His Majesty in Council to be necessary or expedient for purposes of the Regulations.”<sup>3</sup> The phrase itself runs throughout the Defence Regulations like a theme. Thus, a competent authority may take possession of any land “if it appears to that authority to be necessary or expedient so to do.”<sup>4</sup>

The powers of the Minister of Agriculture and Fisheries to control cultivation and to terminate agricultural tenancies can be exercised “as he thinks necessary or expedient.”<sup>5</sup>

“Navigation orders” which the Admiralty is empowered to make may provide for

“such incidental and supplementary matters as appear to the Admiralty to be necessary or expedient.”<sup>6</sup>

The competent authorities having power to control industry may by order provide

“for any incidental and supplementary matters for which the competent authority thinks it expedient for the purposes of the order to provide.”<sup>7</sup>

In the regulation for the avoidance of strikes and lockouts,<sup>8</sup> a similar power is conferred on the Minister of Labour and National Service.

Nor do the purposes for which defence regulations may be made comprehend merely the “securing of the public safety”

<sup>1</sup> Section 1 (2). And see Lord Wrenbury’s analysis of the Act in *R. v. Haisday* [1917] A.C. 260, 305-308.

<sup>2</sup> See, e.g., Carleton Kemp Allen, *Law in the Making* (1939), 3rd ed., 462; C. T. Carr, *Administrative Law* (1933), 51 L.Q.R. 58-75, at 59-61.

<sup>3</sup> Section 1 (4).

<sup>4</sup> Defence (General) Regulations, 1939 (S.R. & O., 1939, No. 927), reg. 51 (1).

<sup>5</sup> Regulation 62 (1).

<sup>6</sup> Regulation 43 (1).

<sup>7</sup> Regulation 55 (1).

<sup>8</sup> Regulation 58AA (1) (c). See also reg. 73B (1) (d).

and "the defence of the realm." They extend to "the maintenance of public order and the efficient prosecution of any war in which His Majesty may be engaged, and for maintaining supplies and services essential to the life of the community." These regulations prevail over all statutes or instruments to the contrary.<sup>1</sup> Nor do they contain the sum of all executive power; the residuary powers of the Crown remain: powers exercisable under defence regulations are in addition to the powers under the royal prerogative.<sup>2</sup>

There is no prerogative, however, to make regulations.<sup>3</sup> Every Order in Council containing defence regulations must be laid before Parliament as soon as possible after it is made, and may be annulled by resolution moved and passed in either House within twenty-eight days; but these orders are not "statutory rules" to which the Rules Publication Act, 1893, s. 1 (4), applies.<sup>4</sup>

<sup>1</sup> Section 1 (4).

<sup>2</sup> Section 9: cf. reg. 51 (2). For the general principle that when a statute empowers the Crown to do a certain thing which it might previously have done under the prerogative, the prerogative is *pro tanto* "abridged" or "in abeyance," and the thing can thenceforth be done only under the statute: see the speech of Lord Atkinson in *Attorney-General v. De Keyser's Royal Hotel* [1920] A.C. 508, 539, 542. The prerogative may be regarded as "what is left of the original sovereign power of the Crown to legislate without the authority of the Houses of Parliament": *Report of Committee on Minister's Powers* (1932), Cmd. 4060, 24, 25. Examples are the power to legislate by Order in Council for a newly conquered country and to regulate trade and commerce in time of war, e.g., the Second Reprisals Order of 16th February, 1917, establishing a rigid blockade of enemy territory: *ib.*

Lord Dunedin cites from *Dicey* the following definition with approval: "The residue of discretionary or arbitrary authority which at any time is legally left in the hands of the Crown": [1920] A.C., at 526. During the war of 1914-18 the Crown could not take possession by the powers of the prerogative alone: *ib.*, at 528. And see *per* Lord Moulton, *ib.*, at 549, 552.

For an historical and a critical disquisition on the prerogative and the cases, see Leslie Scott and Alfred Hildesley, *The Case of Requisition*, chap. III. See also the description cited at 105, and the definition "the residue of the discretionary powers of the executive which are not definitely regulated by law."

And see V. St. Clair Mackenzie, *The Royal Prerogative in War Time* (1918), 34 L.Q.R. 152-159. Pollock appends this illuminating note:—

"Prerogative is nothing more mysterious than the residue of the King's undefined powers after striking out those which have been taken away by legislation or fallen into desuetude. Therefore it is certain that no argument based on prerogative can justify any kind of interference with person or property which would not have been lawful in the Middle Ages: and mediæval notions about the sanctity of property from confiscation without the process of law were pretty strict."

<sup>3</sup> *De Keyser's Case* [1920] A.C. 508, 557, *per* Lord Sumner. See also *per* Lord Parker, in *The Zamora* [1916] 2 A.C. 77, 90. "The idea that the King in Council, or indeed any branch of the executive, has power to prescribe or to alter the law to be administered by courts of law in this country is out of harmony with the principles of our constitution. It is true that, under a number of modern statutes various branches of the executive have power to make rules having the force of statutes, but all such rules derive their validity from the statute which creates the power, and not from the executive body by which they are made."

<sup>4</sup> Thus reg. 18B was withdrawn and an amended reg. 18s submitted.

The Act was passed on 24th August, 1939—to meet “the present emergency”; war did not begin until 3rd September. In May, 1940, after the fall of France, His Majesty in Council resolved to assume wide powers—in the words of the preamble to the Emergency Powers (Defence) Act, 1940—

“to secure that the whole resources of the community may be rendered immediately available when required for purposes connected with the Defence of the Realm.”

In one operative section, and by three lines, this statute brought within the control of His Majesty every person and all property within the realm. Defence regulations might provide for

“requiring persons to place themselves, their services and their property at the disposal of His Majesty.”

for the purposes mentioned in the “principal Act.”<sup>1</sup>

“Allied Powers,” i.e., “foreign powers engaged in alliance with His Majesty, in any war in which His Majesty is also engaged, and “associated authorities,” i.e., “foreign authorities recognised by His Majesty as competent to maintain naval, military or air forces for service in association with His Majesty’s forces,” may be authorised to exercise certain powers (with appropriate modifications) conferred by Defence (General) Regulations.

Any enactment made before 22nd May, 1940, may be amended, suspended or modified by Defence Regulations: more than 200 statutes are affected.<sup>2</sup>

These two statutes—the Emergency Powers (Defence) Acts, 1939 and 1940—upon an Address to His Majesty by each House of Parliament, can be continued in force from year to year during “the emergency.”<sup>3</sup> There is power, by Order in Council, to declare the emergency at an end; at the end of the day on which the order comes into operation the Acts will expire.<sup>4</sup>

<sup>1</sup> “The new Act, printed on a single sheet of paper, comes near to suspending the very essence of the constitution, as it has been built up in a thousand years”: *The Times*, 23rd May, 1940, pp. 6, 7. See *Note* in (1940), 56 L.Q.R. 285, 286, and *per* Lord Macmillan, in *Liversidge v. Sir John Anderson* [1942] A.C. 206, 252. “Sometimes popularly referred to as the Everything and Everybody Act”: Sir Cecil Thomas Carr, *Concerning English Administrative Law* (1941), 19, Note 20, and chap. 3, *Crisis Legislation*.

<sup>2</sup> Emergency Powers (Defence) Act, 1940, s. 1 (2). See list of these statutes in vol. I of *Defence Regulations*, printed by His Majesty’s Stationery Office (15th ed., 24th March, 1944), ii-vi. *Miscellaneous Defence Regulations*, are printed in vol. II (13th ed., 10th August, 1943).

Thus, the War Risks Insurance Act, 1939, has been amended by the Defence (War Risks Insurance) Regulations, 1940 (S.R. & O., 1940, No. 771); the Compensation (Defence) Act, 1939, by Defence (General) Regulations, 1939, regs. 50A, 50B, 51A, 51B, 68AB, 79C, 79CA.

<sup>3</sup> *Ib.*, s. 1 (3), amending s. 11 (1) of the principal Act.

<sup>4</sup> The principal Act, s. 11 (1), proviso.

"If extraordinary powers are here given, they are given because the emergency is extraordinary and are limited to the period of the emergency."<sup>1</sup>

All spheres of legal relations—constitutional and administrative, social and commercial and industrial—are restricted and regulated by defence regulations; these are implemented by orders, rules and bye-laws made by "competent authorities"<sup>2</sup>—His Majesty's Ministers and others. These regulations and their orders constitute a paramount code. Yet although for the duration of the emergency liberty has been suspended, the ordinary law of the land—save as thereby affected—has not been suspended. Neither regulation nor statutory order declares the whole law. Vast tracts of law in time of war lie in the region of common law: the status of an alien enemy, for instance, and his procedural capacity, and the rules of the dissolution of a contract upon the frustration of the adventure.

As Lord Atkin, though *alio intuitu*, nobly declared:—

"In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace."<sup>3</sup>

### 3. "Children" and "Grandchildren" of the Act

In 1931, 800 Statutory Rules and Orders were made; in 1938, 1,606; in 1942, 1,697; in 1943, 1,792; in 1944, 1,479.<sup>4</sup> Regulations made under the statute have been called "the children" of the Act; Orders under the regulations, their "grandchildren."<sup>5</sup> "Great-grandchildren" there are, too: the

<sup>1</sup> *Per* Lord Wright, *Liversidge Case* [1942] A.C., *supra*, 261. For a criticism of legislation by Order in Council, see *per* Bankes, L.J., in *R. v. Secretary of State for Home Affairs, ex parte O'Brien* [1923] 2 K.B. 361, 382. The Emergency Powers Act, 1920—"to make exceptional provision for the protection of the community in cases of Emergency"—remains on the statute book, but becomes effective only by "a proclamation of emergency" (s. 1 (1)), which, unless renewed, cannot remain in force for more than one month at a time. While the proclamation is in force, His Majesty in Council may, by order, make regulations "for securing the essentials of life to the community" (s. 2 (1)). Those regulations may confer on a Secretary of State or Government department or other persons in His Majesty's service, "such powers and duties as His Majesty may deem necessary for the preservation of the peace . . . and for any other purposes essential to the public safety and the life of the community, and may make such provisions incidental to the powers aforesaid as may appear to His Majesty to be required for making the exercise of those powers effective." The regulations must be laid before Parliament and cannot continue in force for more than seven days unless both Houses pass a resolution for continuance: Carr, *op. cit.*, 71, 72.

<sup>2</sup> The principal Act, s. 1 (3). The meaning of the term often varies with the particular regulation, and is specially defined. See regs. 100 (1) and 49 for the meaning in Part IV (regs. 49-78A).

<sup>3</sup> *Liversidge Case* [1942] A.C. 244. The words are reminiscent of the eloquent dissent of Lord Shaw in *R. v. Halliday* [1917] A.C. 260, 288, 289.

<sup>4</sup> *Official Report*, vol. 389, col. 1597; 17th January, 1945.

<sup>5</sup> Sir Cecil Carr seems to be the author, *op. cit.*, 88; the terms were used in the debate on Statutory Rules and Orders, col. 1598.

directions given and instructions issued under the Orders. The Donoughmore Committee on Ministers' Powers in 1932 had recommended the appointment of a Standing Committee to examine delegated legislation and to report to the House of Commons.<sup>1</sup> The far-reaching scope and the frequent unintelligibility of Defence Regulations and Orders have been seriously criticised.<sup>2</sup>

In 1943 the Home Secretary declared that in time of war the setting up of a committee to examine delegated legislation was inapplicable.<sup>3</sup> Matters of primary importance—e.g., the amendment of an Act of Parliament—would be dealt with by Defence Regulation which could be annulled by a prayer.<sup>4</sup> The statutory safeguard in the Act of 1939 against oppressive Defence Regulations—a prayer in either House of Parliament for annulment within twenty-eight days<sup>5</sup>—sometimes invoked, has, on occasion, been successful.<sup>6</sup>

#### 4. Continuance of the Act

The Emergency Powers (Defence) Act, as amended, has been continued in force from year to year, upon an humble Address being presented by each House of Parliament to His Majesty in pursuance of s. 11 (1). A significant debate upon the duration and the limits of delegated legislation took place upon the resolution for its continuance for the year beginning 24th August, 1943.<sup>7</sup>

The suggestion of an advisory or a special or select committee was again put forward whose function it would be to scrutinise delegated legislation and, where necessary or desirable, to call the attention of the House of Commons to its provisions.<sup>8</sup>

<sup>1</sup> (1932), Cmd. 4060, *Official Report*, loc. cit., col. 1599.

<sup>2</sup> Thus an order regulating the supply and distribution of tomatoes ran to nine pages, followed by eight and a half pages of schedules; loc. cit., col. 1635.

And see the full title of the "Control of Tins, Cans, Keys, Drums and Packaging Pails (No. 10) Order, 1943 (No. 1216), cited by Mr. Moelwyn Hughes: *Official Report*, vol. 400, No. 28, 17th May, 1944, col. 278.

<sup>3</sup> Loc. cit., cols. 1648, 1655-1659.

<sup>4</sup> Loc. cit., cols. 1664-1666.

<sup>5</sup> The Emergency Powers (Defence) Act, 1939, s. 8 (2).

<sup>6</sup> See examples and references given by Carr, *A Regulated Liberty*, 42 *Columbia Law Review*, 343, 346. Regulations 78 (*Control of Undertakings*) and 33B (*Compulsory Treatment of Venereal Disease*) were unsuccessfully challenged; reg. 42BA (*Sunday Opening of Certain Theatres*), after a close vote, was annulled.

During the 1942-43 Session there have been ten prayers, dealing, respectively, with: venereal disease; shipping and personal restrictions; road traffic and the speed of agricultural vehicles; billeting and the requisitioning of houses for billeting; the Government's nomination of directors to control factories; fuel consumption and inspection; British Overseas Airways Corporation: trespass on agricultural crops: fireguard duties (*Official Report*, vol. 400, 17th May, 1944, cols. 276).

<sup>7</sup> *Official Report*, vol. 391, No. 69, 15th July, 1943, cols. 425-536.

<sup>8</sup> *Ib.*, cols. 435, 430, 440, 449-452, 475-477, 488.



It was further suggested that, before the appropriate time for renewal arrived in 1944, a notional term be put to the Act in order to avoid the annual necessity for renewal, or that the minimum of powers be produced which were thought to be necessary for the rest of the emergency.<sup>1</sup>

The Home Secretary pointed out that these exceptional Acts, conferring upon the executive "very exceptional" powers, were subject to certain Parliamentary checks.<sup>2</sup> He could not accept the proposal for a select committee; to prosecute the war, exceptional law-making powers were essential, to be exercised with confidence and speed, subject to Parliamentary check by the moving of a prayer.<sup>3</sup> At some time there must be a review: first, from the point of view of those who wished completely to end all exceptional powers, unless a strong case could be made; secondly, from the point of view of protecting the community during the transition from war to peace. Without these powers "I am not even sure the war could go on."<sup>4</sup>

#### 5. *Select Committee on Statutory Rules and Orders*

On 17th May, 1944, the Home Secretary, recognising "changes of circumstances" and the pressure of parliamentary opinion, agreed to set up a small Select Committee of the House of Commons to scrutinise certain statutory rules and orders and to report to the House.<sup>5</sup>

In the course of the debate a member of the Donoughmore Committee illuminated the contrast between legislation by Bill and delegated legislation.<sup>6</sup> The House of Commons has the opportunity of discussing both the principle and the wording of a Bill before it becomes law; with delegated legislation neither the principle nor the wording comes to the notice of the House until a regulation has been made. A draft regulation is subjected to discussion among heads of interested departments and their representatives, but at no stage has the draft been "brought up against its practical application, except to such extent as there may be wise administrators inside the department who foresee possible dangers." Very often a regulation made in good faith is so framed as to achieve not merely its object, but a great deal more—not asked for and not necessarily foreseen.

<sup>1</sup> *Official Report*, vol. 391, cols. 451, 465.

<sup>2</sup> *Ib.* col., 489.

<sup>3</sup> *Ib.* col., 493.

<sup>4</sup> *Ib.* col., 497.

<sup>5</sup> *Official Report*, vol. 400, cols. 202-299, at col. 267.

<sup>6</sup> Mr. Burgin, *ib.*, at cols. 228-231.

"Delegated legislation," said the Home Secretary, "within limits that may be disputable, is necessary and inevitable."<sup>1</sup> Parliamentary checks were therefore desirable, but between "war-time emergency powers" and "peace-time non-emergency powers" there was a clear distinction.<sup>2</sup> A scrutinising committee should see those regulations and orders which Parliament has provided should not be effective unless approved by an affirmative resolution and also those regulations against which a prayer or negative resolution could be raised. There would be power to hear an officer of the department and to ask for a memorandum on the facts.<sup>3</sup> The committee, which would be advised by Mr. Speaker's Counsel, Sir Cecil Carr, would then report to the House. Their function would be neither to discuss policy nor to interpret the law, but to call the attention of the House to matters of which it should be made aware.<sup>4</sup>

On 21st June, 1944, "*The Select Committee on Statutory Rules and Orders*" was set up.<sup>5</sup> The committee consists of eleven members representing all political parties; it has the assistance of the Counsel to Mr. Speaker. The quorum is five. It may sit although the House has adjourned and may report from time to time. The committee may require any Government department concerned to submit a memorandum explaining any rule, order, or draft under consideration, or to depute a representative to appear as a witness in order to explain the document. Before reporting that the special attention of the House be drawn to any such document, the committee must afford any Government department concerned an opportunity of explaining orally or in writing at its discretion.

The functions of the Select Committee are to consider every statutory rule or order (including any provisional rule under Rules Publication Act, 1893, s. 2) laid before the House, or laid in draft before the House, "*upon which proceedings may be taken in either House of Parliament,*" to determine whether on any of five specified grounds the special attention of the House should be drawn to it. The five grounds are—

- (i) that it imposes a charge on public revenue or requires payment for any licence or consent or services to be rendered to a Government department or to a local or public authority;
- (ii) that it is made under enactment specifically excluding it from challenge in the courts;

<sup>1</sup> *Official Report*, vol. 400, col. 264. See Lord Greene's Haldane Memorial Lecture, 1944; *Law and Progress*, 94 *Law Journ.*, 357, 358.

<sup>2</sup> Upon *Administrative Law*, see C. T. Carr, in (1935), 51 *L.Q.R.* 58-75, at 63-69, on *Delegated Legislation*.

<sup>3</sup> *Ib.*, col. 269.

<sup>4</sup> *Ib.*, cols. 268, 274.

<sup>5</sup> *Official Report*, vol. 401, 21st June, 1944, cols. 310, 311.

(iii) that it "appears to make some *unusual or unexpected use of the powers* conferred by the statute under which it is made";

(iv) that *unjustifiable delay in publication* appears to have occurred;

(v) that, "for any special reason, its form or purport calls for elucidation."<sup>1</sup>

### 6. *Review of Emergency Powers*

On 14th July, 1944, upon a motion that an humble Address be presented to His Majesty, praying that the Act be continued in force for a further period of one year, beginning with 24th August, 1944, a debate followed concerning the need for a progressive relaxation of emergency powers when hostilities in Europe come to an end and during the transition from war to peace.<sup>2</sup>

"When hostilities in Europe come to an end," said the Home Secretary, "there must be a general review of emergency powers."<sup>3</sup> Powers will still be necessary for the efficient prosecution of the Japanese war. During the transition from hostilities in Europe to peace, "special powers" would also be required in order to secure "the equitable distribution of supplies." Replying to the Marquess of Reading in the House of Lords on 8th March, 1945, upon the termination of controls and regulations when military necessity has ceased,<sup>4</sup> Viscount Simon, L.C., observed that certain controls, e.g., control of food, would continue to be necessary for some time after the war, and that, if need be, statutory authority to make such regulations would be sought.<sup>5</sup>

Emergency powers were conferred upon His Majesty for "the present emergency"; special legislation, it is submitted, will be required to enable His Majesty to exercise any "special powers" which it is thought expedient that he should be enabled to exercise during the transition from war to peace.

## II. CONSTRUCTION OF EMERGENCY POWERS

### 1. *Discretion of Executive*

Before considering the Defence Regulations as a whole, it is necessary to inquire into certain preliminary matters. What

<sup>1</sup> In their first report, the committee reported that the attention of the House should be drawn to the Utility Apparel and Utility Cloth Orders (Amendment) Order, 1944, on ground (iii). A motion was tabled asking that the order be annulled: *The Times*, 24th July, 1944.

See also *Special Report* upon "certain anomalies in the machinery of Parliamentary control and of rules publication": House of Commons Paper 113 (31st October, 1944).

<sup>2</sup> *Official Report*, 14th July, 1944, vol. 401, cols. 2015-2089.

<sup>3</sup> *Ib.*, col. 2078.

<sup>4</sup> *Official Report*, vol. 135, 6th March, 1945, cols. 326-333.

<sup>5</sup> *Ib.*, 8th March, 1945, cols. 434, 438.

is the quality of the discretion conferred upon the executive ? What canons of construction are employed by the courts ? How far does the doctrine of *ultra vires* apply to a Defence Regulation or to an Order made under it ?

(a) *During War of 1914*

Even under the Defence of the Realm Consolidation Act, 1914, the courts would not inquire into the discretion of the executive where it appeared to have been properly exercised : In *The Zamora*<sup>1</sup> Lord Parker said :—

“ The judge ought, as a rule, to treat the statement on oath of the proper officer of the Crown to the effect that the vessel or goods which it is desired to requisition are urgently required for use in connection with the defence of the realm, the prosecution of the war, or other matters involving national security, as conclusive of the fact. . . . Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a court of law or otherwise discussed in public.”

Yet, *when the war was over*, it was said by Greer, J. :—

“ Regulations which, on the face of them, show that they cannot afford any assistance in securing the public safety and the defence of the realm are not within the powers conferred by the Legislature on the King in Council to make regulations under the Defence of the Realm Consolidation Act, 1914.”<sup>2</sup>

And a regulation which prohibited any person, without the consent of the Minister of Munitions, from taking proceedings to eject a munition worker from a dwelling-house, by a strong Divisional Court was held invalid.<sup>3</sup> To empower a Minister to forbid such proceedings was not considered to be “ a necessary, or even reasonable, way to aid in securing the public safety and the defence of the realm.” Another ground was given : to take away from the King’s subjects their right of access to the courts requires the express words of a statute.<sup>4</sup> The spirit of “ independent scrutiny ” by the judges, urged by Lord Shaw during the war, in his dissenting speech in *R. v. Halliday*,<sup>5</sup> hovered once more over the courts.

(b) *During War of 1939*

In the unparalleled plenitude of their language, the Emergency Powers (Defence) Acts, 1939 and 1940, have conferred upon the

<sup>1</sup> [1916] 2 A.C. 77, 106, 107.

<sup>2</sup> *Hudson's Bay Company v. MacLay* (1920), 36 T.L.R. 469, 476.

<sup>3</sup> *Chester v. Bateson* [1920] 1 K.B. 829, 833, *per* Darling, J.

<sup>4</sup> *Ib.*, 836, *per* Avory, J. ; 838, *per* Sankey, J.

<sup>5</sup> [1917] A.C. 260, 287.

executive "an administrative plenary discretion": it is for the Minister alone to decide whether he has reasonable grounds and to act accordingly.<sup>1</sup> True, Lord Wright, in *The Liversidge Case*, was speaking of the power of the Home Secretary to detain, under reg. 18B (1), a person of whom he has "reasonable cause" to believe certain facts.<sup>2</sup> But the reasoning, it is submitted, is general and applies to the whole foundation of the Defence Regulations. A Minister is empowered to take a prescribed course, "if it appears . . ." or "if he is satisfied," or "if he has reasonable cause."<sup>3</sup> No distinction in meaning—it has been held—flows from the difference in language: "This collection of regulations is more like a fasciculus of different enactments, many made at different dates, than a single statute."

The choice is the choice of the Minister—and his choice alone.

"All the word 'reasonable,' then, means is that the Minister must not lightly or arbitrarily invade the liberty of the subject. He must be reasonably satisfied before he acts, but it is still his decision and not the decision of anyone else."<sup>4</sup>

A court of law could not have before it the information on which the Minister acts, "still less the background of statecraft and national policy which is what must determine the action which he takes on it."<sup>5</sup> There was "no triable issue as to reasonableness for the court."<sup>6</sup> The issue is not "within the

<sup>1</sup> *The Liversidge Case* [1942] A.C. 206, 269, 270.

<sup>2</sup> *Ib.*, 265, upon the restricted powers conferred by reg. 14B made under the Act of 1914, whereby the Minister could only act on the recommendation of a competent naval or military authority, or of the advisory committee.

<sup>3</sup> See the definition of "essential work" as "work appearing to a competent authority to be essential" for war purposes (regs. 54AA (4), 55 (6), 54A (4A)). Compare the definition of "war production undertaking," as "an undertaking which, in the opinion of the competent authority, is or should be principally engaged" on articles required for the war (reg. 54C (4)).

<sup>4</sup> *Ib.*, 268. For the nature of a quasi-judicial decision, and the duty of the Minister, see Cmd. 4060, 73 *et seq.* A quasi-judicial decision involves (1) the presentation of their case by the parties to the dispute; (2) the ascertainment of the facts by means of evidence, often with the assistance of arguments; (3) the submission of legal argument if the dispute is a question of law. It does not, however, involve (4) a decision which disposes of the matter by a finding upon the facts and an application of the law to the facts, with a ruling upon a disputed question of law. The place of (4) is taken by "administrative action, the character of which is determined by the Minister's free choice." His ultimate decision is "governed not by a statutory direction to him to apply the law of the land to the facts and act accordingly, but by a statutory permission to use his discretion after he had ascertained the facts and to be guided by considerations of public policy. This option would not be open to him if he were exercising a purely judicial function" (*ib.*, 74). For examples of quasi-judicial decisions by Ministers, see *ib.*, 90-92.

<sup>5</sup> *Ib.*, 267.

<sup>6</sup> *Ib.*, 269.

competence of any court.” Only the Secretary of State has “the materials for exercising the discretion.”<sup>1</sup>

The knowledge that in the last resort, the Minister is responsible to Parliament for the proper exercise of his emergency powers is a sufficient safeguard against arbitrary abuse.<sup>2</sup>

“ ‘Satisfied’ must mean ‘reasonably satisfied.’ It cannot import an arbitrary or irrational state of being satisfied.”<sup>3</sup>

<sup>1</sup> *Ib.*, 270. “If hard cases make bad law, emergencies may make worse. Either the emergency is not allowed to disturb the permanent and immutable principles or else it smashes its way through them” (Carr, *op. cit.*, 65). The Home Secretary declared in the House of Commons: “The only reason for Defence Regulation 18B is that this is a problem in the nature of which you cannot bring a judicial charge or get a conviction in a court of law. If we could do that, we should not be justified in having reg. 18B at all. It is precisely because these cases are outside that category that we need the regulation” (*Official Report*, vol. 391, col. 504).

See the debate upon the release of Sir Oswald Mosley: *Official Report*, vol. 395, cols. 395-478. The Attorney-General, after pointing out that “the overriding power” to detain is to be found in the Emergency Powers (Defence) Act, 1939, s. 1 (2) (a): Defence Regulations may make provision “for the detention of persons whose detention appears to the Secretary of State to be expedient in the interests of the public safety or the defence of the realm,” declared: “From the moment the Home Secretary decides that it is no longer in the public interest to detain a man, then his detention is unlawful if it is continued” (col. 435).

<sup>2</sup> *Ib.*, 261, 258, *per* Lord Macmillan. See the dicta in *R. v. Halliday* [1917] A.C. 200, 268, *per* Lord Finlay, L.C.: 271, *per* Lord Dunedin: “The danger of abuse is theoretically present; practically, as things exist, it is, in my opinion, absent”; 273, *per* Lord Atkinson; 308, *per* Lord Wrenbury; 285, *per* Lord Shaw, *contra*. And see Dicey, *Development of Administrative Law in England* (1915), 31 L.Q.R. 148-153, at 152.

See W. I. Jennings, *The Rule of Law in Total War* (1941), 50 Yale L.J., 368-386, at 386: “. . . while the powers which the emergency legislation has vested in the Government are wide enough to infringe altogether the principles which might reasonably be regarded as those of the rule of law, those principles, reasonably interpreted, are in fact carried out in the actual exercise of those powers. In other words, the legislation which actually touches the individual citizen through the application of the ‘children’ and the ‘grandchildren’ of the Emergency Powers Acts is not arbitrary or despotic. The Emergency Powers Acts themselves would, in a legal sense, permit of arbitrary government: political conditions, through the control of Parliament, forbid abuses in the exercise of the Acts. The continuing flexibility of the British constitution has made it adaptable to total war. The Government has powers almost as vast as those of any dictator, but parliamentary control prevents those abuses which are associated with dictatorship.”

<sup>3</sup> [1942] A.C., at 271. Upon the *Liversidge Case*, see the Note of Sir W. S. Holdsworth in (1942), 58 L.Q.R. 13. The question whether “reasonable cause” must, in the last resort, be alleged and proved as a question of fact before a court, or whether the mere statement of the Secretary of State (under reg. 18B) that he had reasonable cause for his belief is sufficient, entirely depends on whether the point raises “a justiciable issue”—i.e., “an issue within the competence of the court to try,” or an issue that “turns on political and administrative considerations.” An issue is justiciable “when it must be determined solely by the application of the law to the facts; it is not justiciable if it is not solely so determinable,” but depends upon administrative action and the free choice of the Minister. The distinction is the same as that between a judicial and a quasi-judicial decision (Cmd. 4060, 73-75).

See also Prof. A. L. Goodhart’s Note, *ib.*, 3-8; *Regulation 18B and Reasonable Cause* by Dr. Carleton Kemp Allen, *contra*, supporting the dissenting speech of

The great dissent of Lord Atkin recalls the powerful speech of Lord Shaw in *R. v. Halliday*.<sup>1</sup> He vigorously rejected the "subjective test." "If the Secretary of State has reasonable cause," cannot merely mean, "if the Secretary of State thinks that he has reasonable cause."<sup>2</sup> The words "If A has X" do not mean, and cannot mean, "If A thinks that he has." "Reasonable cause" is a fact, capable of determination by a third party—in English law by the judge, and not by a jury: "it has always been treated as an objective fact, to be proved by one or other party and to be determined by the appropriate tribunal," e.g., in an action for malicious prosecution.<sup>3</sup> Those who framed the Defence (General) Regulations used the words "reasonable cause" to indicate that "mere honest belief is not enough."<sup>4</sup> The object was to secure a condition which, if necessary, could be examined by the courts. Where the decision is left to the Minister without qualification, the words omit the reference to reasonable cause.<sup>4</sup> On the other hand, twenty-three regulations import reasonable cause—some, as an ingredient in an offence, some as a defence, and some in the powers given to the executive for the protection of the State.<sup>5</sup> Coming to reg. 18B, "the organisations . . . are impugned if the Secretary of State is *satisfied* as to their nature, but the person is not to be detained unless the Secretary of State has *reasonable cause to believe* that he is a member . . . I suggest that the obvious intention was to give a safeguard to the individual against arbitrary imprisonment."<sup>6</sup> The original regulation issued in September, 1939, gave the Secretary of State complete discretion ("The Secretary of State if satisfied . . ."). This was withdrawn, and in November, 1939, the regulation was issued in its present form: "The Legislature

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Lord Atkin, *ib.*, 232-242; *A Short Replication*, by "A. L. G.," 243-246; *Last Words on Regulation 18B* by Dr. Allen, containing new facts on the history of the amending of reg. 18B., *ib.*, 462-465; *Note, ib.*, 465, on the Johnsonian meaning of "reasonable." Upon the *Liversidge Case*, r. 14B of 1915, and the amendment of r. 18B of 1939, see Sir Cecil Thomas Carr, *A Regulated Liberty*, 42 Columbia Law Review (1942), 339, 344-355. See also D. M. Gordon, *Administrative Tribunals and the Courts* (1933), 49 L.Q.R. 94-120, at 106, 107, for the distinction between a "judicial" and an "administrative" tribunal; 419-442, at 422-4, upon the meaning of "is satisfied"; and upon the alleged power of inquiry by the courts into the "reasonableness" of the exercise of "administrative" discretion.

<sup>1</sup> [1917] A.C. 280.

<sup>2</sup> [1942] A.C., at 226. "'If A has a broken ankle' does not mean and cannot mean, 'If A thinks that he has a broken ankle . . .'" (*ib.*, 227).

<sup>3</sup> *ib.*, 228.

<sup>4</sup> *ib.*, 232.

<sup>5</sup> *ib.*, 233.

<sup>6</sup> *ib.*, 237.

intentionally introduced the well-known safeguard by the changed form of words.”<sup>1</sup>

An “objective” condition, then, exists to the power of the Minister to detain, the existence of which, if in dispute, is cognisable by a court of law.

“No one doubts that the Emergency Powers (Defence) Act, 1939, empowers His Majesty in Council to vest any Minister with unlimited power over the person and property of the subjects. The only question is whether in this regulation they have done so.”<sup>2</sup>

The detained person is entitled to make objections to an advisory committee; and he must be informed by the chairman, with adequate particulars, of the grounds on which the order has been made. “What are these grounds and these particulars but the very facts constituting the ‘reasonable cause’ which, on the true construction, might have to be investigated by the court?”<sup>3</sup> The Home Secretary is entitled to withhold evidence “which he can assure the court is confidential, and cannot, in the public interest, be disclosed.”<sup>4</sup> If the courts believed the Home Secretary and accepted the substance of the information on which he acted as constituting reasonable cause, they should be satisfied that reasonable cause has been shown.<sup>4</sup>

“I view with apprehension,”  
said Lord Atkin,

“the attitude of judges who, on a mere question of construction, when face to face with claims involving the liberty of the subject, show themselves more executive-minded than the executive. Their function is to give words their natural meaning, not, perhaps, in war-time leaning towards liberty,” but not going beyond the natural construction of the statute.<sup>5</sup>

“It has always been one of the pillars of freedom . . . that the judges are no respecters of persons, and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law.”<sup>6</sup>

In the resurgence after the war of 1914 of the judicial scrutiny of the D.O.R. regulations, the dissenting speech of Lord Shaw<sup>6</sup>

<sup>1</sup> [1942] A.C., at 239.

<sup>2</sup> *Ib.*, 240.

<sup>3</sup> *Ib.*, 241. See *Duncan v. Cammell, Laird & Co., Ltd.* [1942] A.C. 624, and the speech of Viscount Simon, L.C., embodying the unanimous opinion of seven legal peers. And see *Production Injurious to Public Interest* in *The Solicitors' Journal*, vol. 87 (1943), 61–63, 71, 79–80.

<sup>4</sup> *Ib.*, 242.

<sup>5</sup> *Ib.*, 244, following the dictum of Pollock, C.B., in *Bowditch v. Balchin* (1850), 5 Ex. 378, cited by Lord Wright in *Barnard v. Gorman* [1941] A.C. 378, 393.

See Keeton (1942), 5 Mod. L. Rev. 162–173.

<sup>6</sup> *R. v. Halliday* [1917] A.C. 280, 276–306.



became the *locus classicus*. When the war of 1939 is over and gone, and once again, in tranquillity, executive action is tested in the courts, there may well be a judicial return towards the attitude of Lord Atkin.<sup>1</sup> Yet the pronouncement of Lord Wright which represents the law—the “administrative plenary discretion” of the executive<sup>2</sup>—although it was spoken of reg. 18B (1), appears general in its reasoning. The day of “distinguishing” is far off. The day when precedents become persuasive rather than coercive appears to be even further away.<sup>3</sup>

## 2. General Canons of Construction

It is well established that in construing the meaning of a statute, or of a regulation or statutory rule or order,<sup>4</sup> “the language of a Minister of the Crown in proposing in Parliament

<sup>1</sup> See the wise observations by Carr, *op. cit.*, 92. “In the eternal dispute between government and liberty, crisis means more government and less liberty . . . Free peoples, when they temporarily surrender freedom, will expect to see their inheritance restored to them when the storm is over . . . Intensive regimentation and restrictions, impatient suppression of heterodox views, internment of dissentients, and other phenomena likely to be visible in times of great stress are steps toward dictatorship, even when taken along a lawful and constitutional road.”

In the *De Keyser Case* [1920] A.C. 508, 563, Lord Sumner observed: “Experience in the present war must have taught us all that many things are done in the name of the executive in such times purporting to be for the common good, which Englishmen have been too patriotic to contest.”

See Lord Wright’s tribute to Lord Atkin, *In Memoriam* (1944), 60 L.Q.R. 332-334, at 334, and Prof. Gutteridge’s noble appreciation, *ibid.*, 334-340, at 340: “. . . his speech in the House of Lords will go down to posterity as a vigorous re-assertion of the rights of the individual citizen, and, as such, will find a place in the annals of the law.”

<sup>2</sup> The Home Secretary, upon the Resolution on 23rd July, 1943, for the continuance of the Acts, made a statement upon procedure and persons “detained” under reg. 18B (*Official Report*, vol. 391, cols. 498-504). Cases are reviewed periodically by the Home Secretary personally. “The only issue for me is,” he declared, “Is this man likely in certain circumstances to be dangerous to the security of the State?” If he is, I have a right and even a duty to keep him inside. If he is not, I have a duty to let him out. That is broadly the issue upon which the decision is made” (col. 499).

On 16th June, 1944, the Home Secretary stated that in July, 1943, 429 persons were in detention, and 226 on 31st May, 1944. The number of persons detained at any time was 1,829, and the maximum at any given time (August, 1940), was 1,428. The cases are kept under regular review (*Official Report*, vol. 400, col. 2380). The occasional difference of view between the Home Secretary and the Advisory Committee depended on “the wider background” of the Home Secretary than the committee could “possibly have” (col. 2385).

<sup>3</sup> See Essay of Lord Wright, *Precedents*, in University of Toronto Law Journal (1942), vol. IV, 247-277, at 276; Cambridge Law Journal (1943), vol. VIII, 118-145, at 144.

The Supreme Court of the United States “has from the beginning rejected a doctrine of disability at self-correction”: *per* Frankfurter, J., in *Helvering v. Hollock* (1940), 60 Sup. Ct. 444, 452 (quoted in (1941), 19 Can. Bar. Rev. 151).

<sup>4</sup> *Per* Lord Wright in [1942] A.C. 206, 270, 271, citing Lord Haldane, L.C., in *Local Government Board v. Arlidge* [1915] A.C. 120, 130,

a measure which eventually becomes law,"<sup>1</sup> or the language of debate in the House of Commons or the House of Lords is inadmissible in evidence.<sup>2</sup> Yet, where the plain meaning is in doubt, the court will prefer a construction which carries out

"the plain intention of those responsible for the Order in Council rather than one which will defeat that intention."<sup>3</sup>

Lord Atkin declared that the function of the judge is "to give words their natural meaning, not, perhaps, in war-time leaning towards liberty," but, where the liberty of the subject is concerned, not going beyond the natural construction of the statute.<sup>4</sup> Words, however, cannot be construed *in vacuo*, but, as Lord Wright said,

"by scrutinising the language of the enactment in the light of the circumstances and the general policy and object of the measure."<sup>5</sup>

Lord Macmillan reconciles the apparent conflict between the construction of a war-time measure and the general canon of construction in time of peace :—

"It is important to have in mind that the regulation . . . is a war measure. This is not to say that the courts ought to adopt in war-time canons of construction different from those which they follow in peace time . . . But in a time of emergency when the life of the whole nation is at stake it may well be that a regulation for the defence of the realm may quite properly have a meaning which because of its drastic invasion of the liberty of the subject the courts would be slow to attribute to a peace-time measure. The purpose of the regulation is to ensure public safety, and it is right so to interpret emergency legislation as to promote rather than defeat its efficacy for the defence of the realm. That is in accordance with a general rule applicable to the interpretation of all statutes or statutory regulations in peace time as well as in war-time."<sup>6</sup>

<sup>1</sup> *Assam Railways & Trading Co., Ltd. v. Inland Revenue Commissioners* [1935] A.C. 445, 458, *per* Lord Wright.

<sup>2</sup> See also *per* Lord Dunedin, in *Viscountess Rhondda's Claim* [1922] 2 A.C. 339, 390.

<sup>3</sup> [1942] A.C. 206, 219, *per* Viscount Maugham.

<sup>4</sup> *Ib.*, 244.

<sup>5</sup> *Ib.*, 261.

<sup>6</sup> *Ib.*, 251, 252. See *Herbert v. Allsop* [1941] N.Z.L.R. 370 (noted in (1941), 19 Can. Bar Rev., 546, 547), Smith, J. (of the Supreme Court), is quoted as saying : "When the interpretation of legislation of this kind comes before the court, the function of the court is simply to inquire whether the Legislature has used adequate language to achieve its object. In determining this question, the court will give due weight to the paramount fact that the object of the legislation is the preservation of the State which confers these fundamental rights."

In *Ex parte Sullivan* (1941), 1 D.L.R. 676, a person detained under Emergency Regulations was refused a writ of *habeas corpus*.

And see *Arpad Spitz v. Secretary of State for Canada* (1939), Ex. C.R. 162, 166

Where one Order in Council has been superseded by another, said Lord Wright—

“the earlier measure may be referred to as an historical fact and as giving information as to some evil or object which was being remedied.”<sup>1</sup>

The *locus classicus* upon the interpretation of statutes is the *Resolutions* of the Barons of the Exchequer in *Heydon's* case :—

“That for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law), four things are to be discerned and considered :—

(b) First: What was the common law before the making of the Act.

(c) Second: What was the mischief and defect for which the common law did not provide.

Third: What remedy the parliament hath resolved and appointed to cure the disease of the commonwealth.

And, Fourth: The true reason of the remedy.

And then the office of all the judges is always to make such construction as shall suppress the mischief and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the act *pro bono publico*.<sup>2</sup>

These principles have been frequently reaffirmed. Thus, in *Hawkins v. Gathercole*,<sup>3</sup> Turner, L.J., said :—

“In determining the question before us, we have therefore to consider not merely the words of this Act of Parliament,

*per Maclean, J.* (cited in (1940), 18 Can. Bar Rev. 580): “When you come to interpret any war measure, the objects of the same must be held strictly in mind, and such measures must be given that construction which will best secure the end their authors had in mind. One must consider not only the wording of the war measures but also their purposes, the motives which led to their enactment, and the conditions prevailing at the time. In time of war particularly, the substance of things must prevail over form, and usually all technicalities must be swept aside.” See, for the Canadian cases, James Francis, *The War Measures Act - A Summary of the Cases Reported* (1941), 19 Can. Bar Rev. 453-464.

Upon the powers of the Governor-General in Council, of Canada, under the War Measures Acts, to sub-delegate his powers, legislative or administrative, see the exhaustive note on *Reference re Regulations (Chemicals) under War Measures Act* (1943), 1 D.L.R. 248, in (1943), 21 Can. Bar Rev. 141-149.

<sup>1</sup> [1942] A.C. 271. The Interpretation Act, 1889, applies to Defence Regulations and to orders made thereunder: reg. 99b (S.R. & O., 1943, No. 200).

<sup>2</sup> (1584), 3 Co. Rep. 7b. “I am not sure that the wisest rule of construction is not one of the earliest—that is Sir Edward Coke in *Heydon's Case*,” said MacKinnon, L.J., in his Presidential Address to the Holdsworth Club in 1942, on *The Statute Book* (at p. 11). He thinks that the preamble of a statute is fundamental to its understanding, citing Coke (Litt. 79a). “The rehearsal or preamble is a good means to find out the meaning of the statute, and as it were a key to open the understanding thereof.”

<sup>3</sup> (1855), 6 De G.M. & G. 1, 21, 22.

but the intent of the Legislature, to be collected from the cause and necessity of the Act being made, from a comparison of its several parts, and from foreign (meaning extraneous) circumstances, so far as they can justly be considered to throw light upon the subject."

The general principles were well summarised by Sankey, J., (as he then was), in *Attorney-General v. Brown* :—

"In construing an Act of Parliament it is . . . legitimate to consider (1) the state of the law at the time the Act of Parliament was passed, and the changes it was passed to effect ; (2) the sections and structure of the Act of Parliament as a whole . . ."<sup>1</sup>

Thus, in construing the Defence Regulations and the statutory rules and orders made under them, the court will not "lean towards liberty," but will have in mind "the cause and necessity of making the Act"—the paramount purposes of the Emergency Powers (Defence) Act, 1939.<sup>2</sup> Lord Atkinson, in *R. v. Halliday*,<sup>3</sup> had observed :—

"However precious the personal liberty of the subject may be, there is something for which it may well be, to some extent, sacrificed by legal enactment, namely, national success in the war, or escape from national plunder or enslavement."

The theme was emphasised by Greer, J. Speaking of the "methods of attack" during the last war, he said :—

"Under circumstances such as these the notion that there is any effective presumption that Parliament did not intend to interfere with the liberty of the subject or the property of the subject becomes so thin as to be describable as the shade of a shadow, and disappears altogether when we find in the statute (*sc.* D.O.R. Consolidation Act, 1914) express words which show that the Legislature expressly authorised particular regulations which would of necessity restrict the liberty of the subject and his freedom to enjoy his normal rights over his real and personal property."<sup>4</sup>

Scrutton, L.J., characteristically re-emphasised the theme :—  
"It had been said that a war could not be conducted on the principles of the Sermon on the Mount. It might also be said that a war could not be carried on according to the principles

<sup>1</sup> [1920] 1 K.B. 773, 791, citing also *Stradling v. Morgan* (1560), Plowd. 199, 204. See the speech of Lord Blackburn in *River Wear Commissioners v. Adamson* (1877), 2 A.C. 743, 763, 764 ; and *Eastman Photographic Co. v. Comptroller of Patents* [1898] A.C. 571, 573, 575, *per* Earl of Halsbury, L.C. : Cmd. 4060, 54–58.

<sup>2</sup> Section 1 (1).

<sup>3</sup> [1917] A.C. 260, 271.

<sup>4</sup> *Hudson's Bay Company v. MacKay* (1920), 36 T.L.R. 469, 475.

of Magna Charta . . . he protested against the judges being called upon to say how the war should be carried on."<sup>1</sup>

Sir Frederick Pollock, describing Lord Shaw's speech in *R. v. Halliday*<sup>2</sup> as "portentous," wrote to Mr. Justice Holmes:—

"My private opinion is that there is no liberty of the subject in time of war within the realm."<sup>3</sup>

### III. ULTRA VIRES

#### 1. No Application to Defence Regulations

It is submitted that it is not within the competence of the court to inquire whether a Defence Regulation, expressed to be made for one of the purposes laid down in the Emergency Powers (Defence) Act, 1939,<sup>4</sup> is, in fact, "necessary" or "expedient" for one of those purposes. The court cannot inquire into the reasons or the advice which prompted the Order in Council. This is clear from the empowering words: "His Majesty may make such regulations"—not, as *are in fact* necessary or expedient for any of those paramount purposes, but "as appear to him to be necessary or expedient."

"There is no doubt," said Lord Wrenbury, "that every statutory authority must be exercised honestly."<sup>5</sup> But it would appear from the reasoning in the *Liversidge Case*,<sup>6</sup> that an inquiry into the *bona fides* of a Defence Regulation is not a "justiciable issue." A competent authority may not act *mala fide*; but the court cannot be in possession of all the information to enable it to judge whether a regulation was made *bona fide*.<sup>7</sup>

Several cases decided under the Defence of the Realm Consolidation Act, 1914, lay down a contrary principle, and these are examined below.

The principle submitted has been stated by Scott and Clauson, L.JJ., in *R. v. Comptroller-General of Patents, ex parte Bayer Products, Ltd.*<sup>8</sup>

<sup>1</sup> *Roumfield v. Phillips* (1918), 35 T.L.R. 46, 47.

<sup>2</sup> [1917] A.C. 260, 276-306.

<sup>3</sup> *The Pollock-Holmes Letters 1874-1931* (1942), vol. I, 244, 245. See also *Note* (1917), 33, L.Q.R. 205.

<sup>4</sup> Section 1 (1). See Carr, *op. cit.*, 20 "The high-water mark of the voluntary surrender of liberty."

See Walter S. Johnson, *The Reign of Law Under an Expanding Bureaucracy*, (1944), 22 Can. Bar Rev., 380-390, pointing out (*inter alia*) that at Ottawa, since the war, "about 16,000 Orders in Council have been passed, and regulations filling many thousands of pages" (*ib.*, at 384).

<sup>5</sup> *R. v. Halliday* [1917] A.C. 260, 307.

<sup>6</sup> [1942] A.C. 206.

<sup>7</sup> The dictum of Warrington, L.J. in *Re a Petition of Right* [1915] 3 K.B. 640, 666, it is submitted is wrong.

<sup>8</sup> [1941] 2 K.B. 306.

The applicants were a British company trading in chemical products in England. They claimed to be absolute owners in equity of pharmaceutical patents belonging to a German company. One-half of the share capital was held by nominees of the German company ; the other half by nominees of an American company. There were four British directors and one American director. Licences had been granted by the Comptroller to certain licensees in respect of certain of the patents. The company could not successfully oppose the grant because, at the beginning of the war, the German company was the registered proprietor. The company, however, still retained their right to sell their products under their trade marks. The position was altered by Defence Regulation 60E. British manufacturers had applied to the Comptroller for suspension of rights in respect of the certain trade marks and products sold by the company. The company, accordingly, applied for an order of prohibition against the Comptroller from proceeding under that regulation on the ground that it was invalid, since it was not necessary or expedient for any of the purposes laid down in the Emergency Powers (Defence) Act, 1939.

By the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939, a licence to use a patent was not invalid because a party interested was an enemy.<sup>1</sup> Where the proprietor is an enemy or an enemy subject and the Comptroller is satisfied that the rights should be exercised, and that a person who is not an enemy or an enemy subject desires to exercise them, the Comptroller may grant a licence.<sup>2</sup> Where a person proposes to deal with an article the same as or a substitute for the article for which the trade mark was registered, the Comptroller may order that the right to use the registered trade mark be suspended to enable the applicant to establish his use of the other article by a description which does not involve the use of the trade mark.<sup>3</sup> Under the power conferred by the Emergency Powers (Defence) Act, 1939 to "amend any enactment,"<sup>4</sup> reg. 60E<sup>5</sup> was made, empowering the Comptroller to deal with trade marks registered in the name of a British subject.

It was contended that the regulation was outside the purposes specified in the Act. Scott, L.J., said :—

"The effect of the words, 'as appear to him to be necessary or expedient,' is to give to His Majesty in Council a complete

<sup>1</sup> Section 1.

<sup>2</sup> Section 2 (1).

<sup>3</sup> Section 3 (2).

<sup>4</sup> Section 1 (2) (d).

<sup>5</sup> This regulation now appears as reg. 6 of the Defence (Patents, Trade Marks, etc.) Regulations, 1941 (S.R. & O., 1941, No. 1780).

discretion to decide what regulations are necessary for the purposes named in the subsection. That being so, it is not open to His Majesty's courts to investigate the question whether or not the making of any particular regulation was in fact necessary or expedient for the specified purposes."<sup>1</sup>

The "legislative discretion which is left in plain language by Parliament" is "final", not "subject to control by the courts." Even if there were a doubt whether the subject-matter of the regulation came within the purposes mentioned,

"the fact that His Majesty in Council found it necessary or expedient to make the regulation concludes the matter, so far as the judicature is concerned."<sup>2</sup>

Clauson, L.J. (as he then was), pointed out that the power to make a defence regulation rests not upon its necessity or expediency for the purpose named, but upon the appearance to His Majesty, of its necessity or expediency :

"Parliament has plainly placed it within the power of His Majesty to make any regulation which appears to him to be necessary or expedient for the purposes named."<sup>3</sup>

If any inquiry were possible, it would be whether or not His Majesty considered a particular regulation to be necessary or expedient for the purpose named. But to make such inquiry the court has no power :

"This court has no jurisdiction to investigate the reasons or the advice which moved His Majesty to reach the conclusion that it was necessary or expedient to make the regulation. The Legislature has left the matter to His Majesty, and this court has no control over it."

The court is not empowered to investigate the advice given to His Majesty or to question the decision :

"If His Majesty has once reached that conclusion with regard to a regulation, that regulation, when made, is the law of the land, subject to the provision in the Act that, if either House of Parliament takes a view differing from that upon which His Majesty has acted, the order can be annulled."<sup>4</sup>

Thus, whether the regulation was in fact necessary or expedient for the war effort is "wholly irrelevant."

"His Majesty formed the view that it was necessary or expedient, for the purposes mentioned, to make the regulation, and so far as this court is concerned, there is an end of the matter."<sup>4</sup>

<sup>1</sup> [1941] 2 K.B., at 311, 312. See *The Keyser's Case* [1920] A.C. 508, 565, per Lord Sumner.

<sup>2</sup> *Ib.*, 313. The decision of Bennett, J., in *Jones (F. H.) (Machine Tools), Ltd. v. Farrell & Muirsmith* (1940), 3 All E.R. 608, 612, was not approved. Bennett, J., had overlooked the generality of the powers conferred by s. 1 (1).

<sup>3</sup> *Ib.*, 314.

<sup>4</sup> *Ib.*, 316 : i.e., s. 1 (4), s. 8 (2).

## 2. *Authorities to Contrary*

(a) *Lord Atkinson*, discussing the two conditions imposed by the Act of 1914 upon the making of regulations—viz., first, that they could only be issued during the war, and second, that they must be made for the purpose of securing the public safety and the defence of the realm—observed in *R. v. Halliday* :—

“It by no means follows, however, that if on the face of a regulation it enjoined or required something to be done which could not in any reasonable way aid in securing the public safety and the defence of the realm, it would not be *ultra vires* and void. It is not necessary to decide this precise point on the present occasion, but I desire to hold myself free to deal with it when it arises.”<sup>1</sup>

Contrast an observation of *Atkin, J.*, in *Lipton, Ltd. v. Ford*.<sup>2</sup> The validity of a regulation was in issue whereby the Army Council was empowered to take possession of any food. The regulation, it was argued, was *ultra vires*, because it was, in terms, absolute and was not limited to the purpose of securing the safety and defence of the realm. Nor was taking possession of a crop of raspberries for the troops necessary for the public safety or the defence of the realm. *Atkin, J.*, said :—

“I think that all that I have to see is whether the regulation is one that is reasonably capable of being a regulation for securing the public safety and defence of the realm. If it is, I do not think the court is entitled to question the discretion of the executive, to whom Parliament has entrusted powers in such wide terms . . . I doubt whether I have to consider further whether, in exercising powers given in general terms by the regulation, the Army Council or other authority are in fact acting for the public safety, though I understood the Attorney-General to concede that an exercise of the power under the regulation would not be valid unless it was in fact for the public safety. I am inclined to think that the regulation meant to give an unrestricted power to the bodies named, trusting them to exercise the powers in the public interest and leaving the subject who thought he was oppressed to his proper remedies for an oppressive use by the executive of their legal powers.”<sup>3</sup>

(b) The clearest statement that a regulation which, on the face of it, cannot conduce to an emergency purpose, is *ultra vires*, is in the judgment of *Greer, J.*, in *Hudson's Bay Co. v. MacLay*.<sup>4</sup>

The question was the validity of the Shipping Controller's power under a Defence Regulation made under the Act of 1914

<sup>1</sup> [1917] A.C. 260, 272, 273.

<sup>2</sup> [1917] 1 K.B. 647.

<sup>3</sup> *Ib.*, 654, 655.

<sup>4</sup> (1920), 36 T.L.R. 469.



to give directions upon the use of ships and to prohibit a British ship from going to sea without a licence.

In October, 1914, the company made an agreement with the French Government that for five years they should be the agents of the Government in buying and transporting food to France. After the armistice the British Government continued the control of food and the French Government continued their arrangement. The company chartered many vessels on behalf of that Government, but the Shipping Controller refused licences and directed the vessels to the River Plate to get maize for the Royal Commission on Wheat Supplies. The company asked for a declaration that the material regulations<sup>1</sup> were *ultra vires* and void. Hostilities, they said, were over ; no emergency existed : the regulation was not within the Act and was not reasonably necessary for securing the public safety ; to fix a lower freight than the market rate was, in effect, to confiscate a ship, and to tax the shipowner for the benefit of other citizens.

Greer, J., held that the orders given by the Shipping Controller were within the powers conferred by regulation. He could not therefore, challenge any particular order on the ground that it could not reasonably be said to further the safety of the public or the defence of the realm.

“The issuing of orders that are within his powers must be left to the discretion of the executive officer in whom the legal powers are vested.”<sup>2</sup>

Did the regulations go outside the legislative powers assigned to the King in Council ? Of these powers, said the learned judge, there were three limitations. *First*, they must continue during the continuance of the present war only. *Secondly*, “they must be exercised honestly with the intention of securing the public safety and defence of the realm.”<sup>3</sup> It was argued that a third limitation existed : that the regulation must be reasonably capable of securing the public safety and the defence of the realm. Lord Wrenbury, however, thought that, provided the honesty of the competent authority were not challenged, and the regulation was *intended to be made* for the purpose of the Act, there was no other limit.<sup>4</sup> This would seem to mean that the judges cannot enter into the question whether the regulations have or have not the tendency to promote the public safety and defence of the realm. That, said Greer, J., was stating the powers more widely than the statute justified.

“I do not think that a regulation is valid merely because it is issued by the King in Council as one of the regulations

<sup>1</sup> Regulations 39BBB and 39DD : cf. Defence (General) Regulations, 1939 regs. 45c (1).

<sup>2</sup> 36 T.L.R. 474.

<sup>3</sup> *Ib.*, 475.

<sup>4</sup> *R. v. Halliday* [1917] A.C. 280.

under the Defence of the Realm Act, 1914 . . . In my judgment a regulation which, upon the face of it, could not possibly aid in securing the public safety or the defence of the realm would be outside the legislative territory assigned by the Act to the King in Council."<sup>1</sup>

Lord Atkinson had suggested some such limitation.<sup>2</sup> Accordingly, Greer, J., in the following terms, stated what he considered to be the *third* limitation :—

" Regulations which, on the face of them, show that they cannot afford any assistance in securing the public safety and the defence of the realm are not within the powers conferred by the Legislature on the King in Council to make regulations under the Defence of the Realm (Consolidation) Act, 1914."<sup>3</sup>

For the purposes of the Act, in 1920 the war still continued. The regulation was issued with the intention of securing the public safety and the defence of the realm.

" The fact that it was issued as a regulation under the Act is sufficient to prove that it was issued with such intention."<sup>3</sup> It remained to consider whether, on the face of it, it could not possibly assist in securing the public safety and the defence of the realm. The measure was obviously one which could usefully help " by enabling the country to obtain a sufficient stock of food to provide stamina for the troops and to maintain and hearten the civil population." The Controller was entitled to fix the freight below the market rate—to assist to reduce the cost of the carriage of food and to control remuneration. Statutory powers must be honestly exercised. " If the Shipping Controller directed that commodities should be carried without any freight at all, or at a negligible rate of freight, such a direction . . . would not be an honest and *bona fide* exercise of his powers to fix freights."

It is respectfully submitted that the courts have no competence to enter upon the inquiry involved in the *third* limitation stated by Greer, J.

(c) A regulation providing that no person should, without the consent of the Minister of Munitions, take proceedings to obtain possession of a dwelling-house situate in a " special area " in which a munition worker is living, was held invalid : (*Chester v. Bateson*).<sup>4</sup>

The appellant argued that the regulation was invalid in that it prevented a landlord from access to the courts except with

<sup>1</sup> 36 T.L.R. 475.

<sup>2</sup> *Ib.*

<sup>3</sup> 36 T.L.R., at 476. The reasoning of Greer, J., was applied in South Africa in *Pakai v. Salisbury City Council* (1940). Noted (1940), 57 South African Law Journal, 418 419.

<sup>4</sup> *Chester v. Bateson* [1920] 1 K.B. 820. Regulation 2A (2) : " Tolerated while the guns were still firing, it outstayed its welcome as abnormal departmental activity so often does " : Carr, *op. cit.*, 25.

consent of a Minister. A regulation prohibiting the ejectment of a munition worker might be justified, but it was not necessary to make ministerial consent a condition precedent to proceedings, or to make proceedings without consent a criminal offence. The regulation offended against Magna Charta.<sup>1</sup>

"Magna Charta," observed Darling, J., "has not remained untouched; and, like every other law of England, it is not condemned to that immunity from development or improvement which was attributed to the laws of the Medes and the Persians."<sup>2</sup> The learned judge founded himself upon Lord Atkinson's dictum in *R. v. Halliday*<sup>3</sup>; is it necessary, or even reasonable, to aid in securing the public safety and the defence of the realm, to empower a Minister to forbid legal proceedings to recover possession of a house while a war worker is living in it? <sup>4</sup>

"I think this express disability can be inflicted only by direct enactment of the Legislature itself, or that so grave an invasion of the rights of all subjects was not intended by the Legislature to be accomplished by a departmental order . . ."<sup>4</sup>

The regulation not only barred access to the courts, but made resort without ministerial permission a summary offence. "I allow that in stress of war we may rightly be obliged, as we should be ready, to forgo much of our liberty, but I hold that this elemental right of the subjects of the British Crown cannot be thus easily taken from them."<sup>5</sup>

Avory, J., asked: Could the regulation be said to be one for securing the public safety and the defence of the realm? The prevention of the disturbance of munition workers was a reasonable purpose; a regulation preventing their ejectment, except under prescribed conditions, would probably be *intra vires*; but this regulation deprived the King's subjects of their right of access to the courts and "rendered them liable to punishment if they have the temerity to ask for justice in any of the King's courts."<sup>6</sup> "Nothing less than express words in

<sup>1</sup> Cited [1920] 1 K.B., at 831: "*nulli vendemus, nulli negabimus, aut differemus justitiam, vel reatum*," also (Co. Inst., Pt. II (1809, ed., p. 55).

<sup>2</sup> *Ib.*, 832.

<sup>3</sup> [1917] A.C. 260, 272.

<sup>4</sup> [1920] 1 K.B., at 833. Under the Vexatious Actions Act, 1896, certain persons are deprived of the right to resort to the King's courts, but only after the intervention of the Attorney-General, and then, upon an order of the High Court: contrast the present uncontrolled power of veto.

<sup>5</sup> *Ib.*, 834. Darling, J., quotes from the judgment of Scrutton, J., in *Re Boaler* [1915] 1 K.B. 21, 36, a case under the Act of 1896, where, in the absence of clear words to the contrary, the Court of Appeal declined to extend the Act to criminal proceedings. (In that case, Buckley, L.J., dissented in a strong judgment.)

See also *per* Atkin, L.J., approving the language of Scrutton, J., in *Robinson and Co. v. R.* [1921] 3 K.B. 183, 204: "It requires clear and express language in a statute to take away a right of recourse to His Majesty's courts of justice."

<sup>6</sup> [1920] 1 K.B., at 836.

the statute taking away the right of the King's subjects of access to the courts of justice would authorise or justify it." The regulation, he thought, was in conflict with Magna Charta, by which the pretended form of suspending the laws by regal authority, without the consent of Parliament, is illegal.

Sankey, J., observed :—

"It is true that the power to make a regulation to prevent the successful prosecution of the war being endangered is of a wide and sweeping character, but I decline to hold that Parliament intended by these general words to give to the executive the right to close any of the King's courts against his subjects unless they obtained the sanction of a minister to resort thereto . . . I should be slow to hold that Parliament ever conferred such a power unless it expressed it in the clearest possible language, and should never hold that it was given indirectly by ambiguous regulations made in pursuance of any Act."<sup>1</sup>

This is a strong decision of a strong court. It was given after the war was over, when the reaction against government by Order in Council had set in. It is difficult to see how it is consistent with the principles laid down by Lord Wright in the *Liversidge Case*<sup>2</sup> or by the Court of Appeal in *Ex parte Bayer Products, Ltd.*<sup>3</sup> After the present war there will, no doubt, be a similar turn of the tide and the wide dicta in the *Liversidge Case* may be disavowed. Meanwhile, can it reasonably be argued that reg. 54A (2) is *ultra vires*? Power is given to permit a nuisance by order, where a competent authority is "satisfied that it is necessary" in the interests of the war so to do; *no legal proceedings can be entertained* for the abatement of such nuisance; instead, the competent authority may hold an inquiry into the extent of the nuisance or the steps to minimise it.<sup>4</sup>

(d) A regulation purporting to deprive persons whose goods are requisitioned of their right to the fair market value and to a judicial decision of the amount was held *ultra vires*: *Newcastle Breweries, Ltd. v. R.*<sup>5</sup>

<sup>1</sup> [1920] 1 K.B., at 838. See *Adams v. Naylor* [1944] 1 K.B. 750, 759, 766, *per* Scott, L.J., and Morton, J.

<sup>2</sup> *Supra*, 48, 49.

<sup>3</sup> *Supra*, 56-58.

<sup>4</sup> *Id.*, para. (3). See Carr, *op. cit.*, 86, 87, for a criticism of *Chester v. Bateson*: "We seem here to be on the edge of a judicial pronouncement that there are certain fundamental rights which legislators cannot diminish—the American rather than the British doctrine."

Since July, 1944, such a regulation or order will be scrutinised by the Select Committee on Statutory Rules and Orders, which would, no doubt, draw the attention of the House to it.

<sup>5</sup> [1920] 1 K.B. 854. The principles of assessing compensation for requisitioned property have been laid down at the outset of the present war in the Compensation (Defence) Act, 1939, as amended by Defence Regulation. The amount is assessed administratively between the claimant and the requisitioning authority; in

It is submitted that this decision is wrong.

The Admiralty, under reg. 2B of the D.O.R. Regulations, 1914, took possession of 239 puncheons of rum. The suppliants claimed the market value and that such value, unless agreed, should be determined by a court. The Admiralty offered £10,774, about one-third of the market value; if further payment was required, this should be determined by the Losses Commission. By reg. 2B, the price, in default of agreement, was to be determined by the compensation tribunal. Regard need not be had to the market price, but to the cost of production and the normal and reasonable pre-war rate of profit and to "any other circumstances of the case."

It was argued that the executive could not, by regulation, take away the jurisdiction of the courts and set up a new legal tribunal; although the Crown may by its prerogative establish courts to proceed according to the common law, yet "it cannot create any new court to administer any other law, and it is laid down by Lord Coke, in the 4th Inst. that the erection of a new court with a new jurisdiction cannot be done without an Act of Parliament."

Salter, J., accepted the "reasonably capable" test of validity. Is the regulation "reasonably capable of being a regulation for securing the public safety and the defence of the realm? If it is, it is valid, and the Crown in Council is the sole judge of its expediency."<sup>2</sup> The tribunal was the Defence of the Realm Losses Commission, which recommended *ex gratia* payments for "direct and substantial loss incurred and damage sustained"

default of agreement, the issue is determined by a statutory body, called the General Claims Tribunal (or the Shipping Claims Tribunal, as the case may be) (ss. 7, 8). Appreciation in value due to the emergency is explicitly excluded (s. 2 (1), proviso (i); s. 4 (1), proviso (i); s. 5 (1) (a); s. 6 (1)). The chairman is Sir Sydney Rowlatt, a former High Court judge, and the members include Lewis and Cohen, JJ., and Lord Patrick (of the Court of Session). Their determination is final and is not an "award" and may not be set aside for an error of law: *Rucecourse Betting Control Board v. Secretary of State for Air* [1944] Ch. 144, reversing the decision of Uthwatt, J. [1943] Ch. 198, 205. The only remedy is the statement of a consultative case under s. 7.

The Crown has no power to requisition property without paying compensation: "There is no prerogative right to elect not to pay," *per* Lord Sumner in *De Keyser's Case* [1920] A.C. 508, 562. In *France Fenwick & Co. v. R.* [1927] 1 K.B. 458, 467, Wright, J., said: "... I shall assume that the Crown has no right at common law to take a subject's property for reasons of State without paying compensation." In an extra-judicial essay, on *United Australia v. Barclays Bank*, Lord Wright inclines to the view that this liability is quasi-contractual: (1941), 57 L.Q.R. 200. See also Leslie Scott and Alfred Hildesley, *The Case of Requisition* (1920), Excursus I, 136-157.

Where, under emergency powers of the last war the Crown compulsorily acquired the fee simple of licensed premises, compensation was payable *as of right*, under the Lands Clauses Consolidation Act, 1845: *Central Control Board (Liquor Traffic) v. Cannon Brewery Co., Ltd.* [1919] A.C. 744.

<sup>1</sup> *Ib.*, 857, citing Lord Westbury, L.C., in *Re The Bishop of Natal* (1865), 11 Jur. (N.S.) 353, 358; 3 Moo. P.C. (N.S.) 115, 152.

<sup>2</sup> [1920] 1 K.B., at 864.

through interference by the Crown with "property or business." Thus, the subject would be deprived of the market value of his goods given to him by previous statutes. Salter, J., continued :—

"I do not think that a regulation which takes away the subject's right to a judicial decision or transfers the adjudication of his claim, without his consent, from a court of law to named arbitrators, could fairly be held to be a regulation for securing the public safety and the defence of the realm, or a regulation designed to procure the successful prosecution of the war being endangered, within the meaning of these words in the Defence of the Realm Consolidation Act, 1914."<sup>1</sup>

The regulation authorised the taking by the Crown of goods for an indefinite time without "payment of the pecuniary equivalent at the time of requisition." A statute will not be read as authorising the taking of a subject's goods without compensation in the absence of a clear expression of intention.<sup>2</sup>

"A power to take the goods of a particular subject, or class of subjects, without payment of the then cash value is a power of taxation by the executive."<sup>2</sup>

With this decision Greer, J., did not agree. He thought that it was within the powers of the King in Council to legislate on the price and to enact by regulation that it be determined by the Losses Commission; access to the courts was not barred: an action would lie for the price. The regulation permitting requisition involved an implied promise to pay not the market price but the price fixed by that Commission.<sup>3</sup> Lord Dunedin approved the decision.<sup>4</sup> Bankes, L.J., did not agree with the view of Salter, J.<sup>5</sup>

<sup>1</sup> [1920] 1 K.B., at 865.

<sup>2</sup> *Ib.*, 866.

<sup>3</sup> *Hudson's Bay Company v. Maclay* (1920), 36 T.L.R. 469, 478.

<sup>4</sup> *Attorney-General v. De Keyser's Royal Hotel* [1920] A.C. 508, 529.

<sup>5</sup> *Robinson & Co. v. R.* [1921] 3 K.B. 183, 197.

During the war of 1914-18, compensation for requisitioned property was assessed by the Defence of the Realm Losses Royal Commission. The Commission was appointed by warrant in March, 1915, "to inquire and determine, and to report what sums (in cases not otherwise provided for) ought in reason and fairness to be paid out of public funds to applicants who (not being subjects of an enemy State) are resident or carrying on business in the United Kingdom, in respect of direct and substantial loss incurred and damage sustained by them by reason of interference with their property or business in the United Kingdom through the exercise by the Crown of its rights and duties in the defence of the Realm." (Cited, with references, by Scott and Hildesley, *op. cit.*, 89, 90.) The Commission administered "the bounty of the Crown": it had no jurisdiction where the applicant had, or claimed, rights at law under statute or agreement (*op. cit.*, 90). It was not a legal tribunal; it awarded money *ex gratia*; its decisions could not be challenged on appeal, or by review (*op. cit.*, 91).

The Indemnity Act, 1920, s. 2 (1), made statutory the right to compensation in cases of the requisition of ships, of land, or of chattels; compensation would be assessed by a statutory tribunal—the Commission, thenceforth called "The War Compensation Court"—whose decision was final, subject to an appeal, on a

### 3. *Applicability to Orders*

"A defence regulation, and any order, rule or bye-law *duly made* in pursuance of such a regulation" prevails over any statute or instrument.<sup>1</sup>

The order must be *duly made*: *first*, it must purport to have been made by the "competent authority" empowered by the appropriate regulation to make such an order; *secondly*, its terms must fall within the ambit of the powers conferred by the regulation. The language, however, in which those powers are conferred is normally so wide as to constitute the executive the sole judge of their necessity or expedience. Thus, the power to control includes a power to provide by order—

"(e) for any incidental and supplementary matters for which the competent authority thinks it *expedient for the purposes of the order* to provide."<sup>2</sup>

In "Essential Work Orders" the Minister of Labour and National Service can go further. He may provide by order—

"(d) for any incidental and supplementary matters for which the Minister thinks it *expedient to provide*."<sup>3</sup>

question of law, to the Court of Appeal, and, with leave of that court, to the House of Lords. The principles of assessment were specified in s. 2 (2): (i) *any special principles* laid down in the Defence of the Realm Regulations would apply, e.g., compensation for chattels upon the basis not of existing market price, but of cost with an allowance for profit at pre-war rate; (ii) *claims by shipowners* would be assessed upon the principles acted upon by the Admiralty Transport Arbitration Board (*op. cit.*, 90, 91); (iii) (a) if apart from the Act, the claimant would have had a *legal right to compensation*, the tribunal would give effect to that right but would have regard to "the existence of a state of war and to all other circumstances relevant to a just assessment of compensation," and would exclude claims for indirect loss; (b) if, apart from the Act, the claimant would have had *no legal right*, compensation would be assessed upon the principles observed by the Commission, set out in the Schedule, Pt. II (*op. cit.*, 161-167).

The Compensation (Defence) Act, 1939—as amended by Defence (General) Regulations, regs. 50A, 50B, 51A, 51B, 68AB, 79C, 79CA—which governs requisitions during the present war, prescribes the measure of compensation for (a) the possession of land; (b) the requisition or acquisition of property other than land; (c) the doing of work on land, to be assessed by agreement, or, in default, by the General Tribunal, or the Shipping Tribunal (as the case may be), whose decision, subject to a special case on any question of law, is final. The decisions of the General Tribunal are reported in the *Estates Gazette* and in the *Estates Gazette Digest of Cases*. The provisions of the Act are without prejudice to agreements for compensation made outside the Act (s. 15).

<sup>1</sup> Emergency Powers (Defence) Act, 1939, s. 1 (4).

<sup>2</sup> Regulation 55 (1) (e).

"Their powers are so wide and undefined that the possibility of a case of *ultra vires* is theoretical and almost fantastic." These words (from the speech of Lord Wright in *General Medical Council v. Spackman* [1943] A.C. 627, 640), used in quite another context, may be applied to such orders as are now under consideration.

<sup>3</sup> Regulation 58A (4A) (d). "All that the court can do is to see that the powers which it is claimed to exercise is one which falls within the four corners of the powers given by the Legislature and to see that those powers are exercised in good faith": *per* Lord Greene, M.R., in *Carltona, Ltd. v. Commissioners of Works and Others* (1943), 2 All E.R. 560, 564.

Defence regulations have "played havoc with the statute book . . . but in practice the grandchildren have not been allowed to do this."<sup>1</sup> It would seem impossible to challenge an order made under such wide powers. If, by inadvertence, the Minister has, in a particular case, exceeded his powers, the gap would no doubt speedily be filled by amended regulation. The Indemnity Act, 1920, moreover, prohibited any "action or other legal proceedings whatsoever, whether civil or criminal," for anything done during the last war and before the Act was passed, if done "in good faith and done or purported to be done in the execution of his duty or for the defence of the realm or the public safety, or for the enforcement of discipline, or otherwise in the public interest," by a person holding office under or employed in the service of the Crown in any capacity, or by any person acting under his authority.<sup>2</sup>

There is a *third* requirement—which is *presumed*, e.g., that the order has been made in *good faith*. Bad faith must be proved by the party alleging it.<sup>3</sup> In no reported case hitherto has this point been raised.

(a) In *John Fowler & Co. (Leeds), Ltd. v. Duncan*<sup>4</sup> the Minister of Supply had appointed a controller of the company and given him control over the servants of the company, its financial transactions, and over "the management and conduct." The company manufactured agricultural machinery; it had contracts with different Government departments. After the outbreak of war it began, in addition, the manufacture of certain machines connected with the war, the contracts for which were with the Minister of Supply. Friction resulted between the company and the controller, and the proper working of the business was hampered. The company, which was in financial difficulties, asked for a declaration that the appointment of the controller and the powers conferred on him were *ultra vires*.

Farwell, J., said that the controller was empowered "to exercise such functions of control" as are provided in the order. The word has "a very wide meaning"; the Minister may appoint a controller "with the widest possible powers over the whole and every part of the undertaking." He cannot delegate his powers, though he may appoint someone to assist him; the controller is the only person who can exercise the powers of a controller. The controller, however, had exceeded his powers in directing the company to increase its overdraft.<sup>5</sup>

<sup>1</sup> Carr, *op. cit.*, 89.

<sup>2</sup> Section 1 (1).

<sup>3</sup> See *Carltona Case* (1943), 2 All E.R. 560, 564, per Lord Greene, M.R., *infra*; *Point of Ayr Collieries Case* (1943), 2 All E.R. 546, 547, per Lord Greene, M.R., *infra*. See the criterion of *bona fides* suggested by Avory, J., in *The Sheffield Conservative Club Case* (1916), 85 L.J.K.B. 1669, 1672.

<sup>4</sup> [1941] Ch. 450. The Minister acted under reg. 55 (4) and (5).

<sup>5</sup> *Ib.*, 456.



It is submitted that "control over . . . financial transactions in connection with the said undertaking" are very wide words, not limited to existing financial transactions. Since, however, the controller can exercise powers provided by the order, any similar defect could be cured by providing specifically that he might do what Farwell, J., held that he was unable to do.

(b) The Check Trading (Control) Order, 1942, made under reg. 55, is not *ultra vires* : *The Progressive Supply Co., Ltd. v. Dalton*.<sup>1</sup>

The order provided that no person should carry on the business of check trading in contravention of directions of the Board of Trade. By the Check Trading Direction, 1942, no check trader must charge or accept, or cause to be charged or accepted, any poundage. The effect of this order and direction, it was contended, would be to prevent check trading from functioning with profit—a "system whereby the working class community and others of limited means obtain clothing, . . . furniture, household goods, . . . and other necessities of life and pay for these necessities by weekly instalments, but at net cash prices." The transaction does not involve buying and selling by the check trader. He does not "deal in" goods, but provides a system whereby "the customer can obtain goods from the shopkeeper and pay for them, not at once, but by means of a check which is handed to the shopkeeper and is subsequently handed back to the customer if it has not been fully used. The shopkeeper obtains his money from the plaintiff company, and the plaintiff company obtains its money from the customer by weekly instalments."

It was suggested, said Farwell, J., that there was no evidence that such an order was necessary or expedient for the purposes mentioned in the Emergency Powers (Defence) Act, 1939.

"In my judgment, that is not a matter for this court at all.

If the Crown, acting through its proper servant, makes a regulation, that must be taken as being a regulation which, in the opinion of the Crown, is necessary or expedient for securing the public safety, the defence of the realm and for the other reasons mentioned. It is not for this court to consider at all whether there is evidence of any necessity for the making of such an order."

The regulation was wide enough to permit the control of check trading—"a form of business . . . for the purpose of promoting or facilitating the sale of various articles or goods."

(c) Where a competent authority has come to the conclusion that it is *necessary or expedient to take possession of land under reg. 51* (1) the court cannot, in the absence of bad faith, investigate the grounds or the reasonableness of the decision : *Carltona, Ltd. v. Commissioners of Works and Others*.<sup>2</sup>

<sup>1</sup> [1943] Ch. 54.

<sup>2</sup> (1943), 2 All E.R. 560

In the course of the "concentration of industry," the Ministry of Food and the Ministry of Labour and National Service scheduled the company's factory for closing and took steps to withdraw supplies of raw material and labour. Later, the Commissioners of Works requisitioned the factory for storage. The company thereupon issued a writ against the three authorities, claiming a declaration that the Commissioners were not entitled to take possession and that the notice was invalid, and an injunction restraining the defendants from acting upon the notice, or from taking steps to enforce the same by interfering with possession or the supply of raw materials or of labour. The claims against the Minister of Food and the Minister of Labour and National Service were not proceeded with; the sole question was whether the requisition was valid. The Commissioners had acted under Defence (General) Regulations, 1939, reg. 51 (1).<sup>1</sup> A letter signed on their behalf informed the company that "the Department have come to the conclusion that it is essential, in the national interest, to take possession of the above premises." The company was asked to take this letter as formal notice and to have the unrequitioned chattels removed. Hilbery, J., dismissed the action on the ground that he was not entitled to inquire into the merits.

Three points were raised on appeal: *First*, it was argued that the notice was bad because the letter gave a reason which was not mentioned in the regulation. Upon this Lord Greene, M.R., said :—

"The giving of notice is not a pre-requisite to the exercise of the powers and, accordingly, the notice must be regarded as nothing more than a notification, which the Commissioners were not bound to give, that they are exercising those powers."<sup>2</sup> The phrase "in the national interest" was used "as a sort of shorthand . . . a comprehensive phrase to cover all the grounds mentioned in the regulation."<sup>2</sup>

*Secondly*, it was said that the requisition itself was bad because the competent authority—the Commissioners of Works or the First Commissioner himself—never brought their minds to bear on the question.

But no Minister can personally attend to all his functions. Ministerial powers are normally exercised by responsible officials under ministerial authority.

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<sup>1</sup> "A competent authority, if it appears to that authority to be necessary or expedient so to do in the interests of the public safety, the defence of the realm or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community, may take possession of any land, and may give such directions as appear to the competent authority to be necessary or expedient in connection with the taking possession of that land."

<sup>2</sup> (1943), 2 All E.R., at 562. But see (1944), 2 All. E.R., 589, 592.

Public business," said Lord Greene, " could not be carried on if that were not the case. Constitutionally, the decision of such official is, of course, the decision of the Minister. The Minister is responsible. It is he who must answer before Parliament for anything that his officials have done under his authority, and, if for an important matter he selected an official of such junior standing that he could not be expected competently to perform the work, the Minister would have to answer for that in Parliament. The whole system of departmental organisation and administration is based on the view that Ministers, being responsible to Parliament, will see that important duties are committed to experienced officials. If they do not do that, Parliament is the place where complaint must be made against them."<sup>1</sup>

Here, the official was an assistant secretary, " a high official of the Ministry." It was argued that he never considered under which heading in reg. 51 (1) possession of these premises was required. But those heads are not " mutually exclusive "; " they overlap at every point and many matters will fall under two or more of them, or under all four." *On the facts of this case* it would have been a waste of time " for anyone seriously to sit down and ask himself under which particular head the case fell." He regarded it as falling under all the heads ; he did bring his mind to bear on the relevant question whether, for the purposes named, or some of them, it appeared to him necessary or expedient to take possession of this property.

*Thirdly*, it was contended that if the competent authority had really brought their minds to bear on the matter, they could not have decided to take possession of this property. In the absence of bad faith, said Lord Greene (and bad faith was not raised), that argument was not open in that court :—

" . . . where a regulation of this kind commits to an executive authority the decision of what is necessary or expedient and that authority makes the decision, it is not competent to the courts to investigate the grounds or the reasonableness of the decision in the absence of an allegation of bad faith. If it were not so it would mean that the courts would be made responsible for carrying on the executive government of this country on these important matters."<sup>2</sup>

Parliament has committed to the executive " the discretion to decide."

" All that the court can do," Lord Greene concluded—and Goddard and du Parcq, L.JJ., agreed—

" is to see that the power which it is claimed to exercise is one which falls within the four corners of the powers given by the

<sup>1</sup> (1943), 2 All E.R., at 563.

<sup>2</sup> *Ib.*, at 564

Legislature and to see that those powers are exercised in good faith . . . Apart from that, the courts have no power at all to inquire into the reasonableness, the policy, the sense, or any other aspect of the transaction."<sup>1</sup>

(d) Where a competent authority has come to the conclusion that it is *necessary or expedient to appoint an "authorised controller" over an existing undertaking, under reg. 55 (4)*, the court cannot, in the absence of bad faith, investigate the grounds or the reasonableness of the decision: *Point of Ayr Collieries, Ltd. v. Lloyd George and Others*.<sup>2</sup>

The Minister of Fuel and Power had appointed a controller over a Flintshire colliery, and the colliery claimed a declaration that no facts or circumstances existed, or had existed, which entitled the authority to exercise control, and that the order was invalid. The Minister had directed his mind to the making of this order which was signed by the Secretary to the Ministry in accordance with the Minister's own decision.

No "urgent necessity," it was contended, existed; the Minister was misinformed that a strike was about to take place. There was a neglect to ascertain the true facts; no inquiry was made from the colliery. The order was based upon a misconception. The colliery had had no strike or lock-out since 1926; it had the highest output in the north-west area and absenteeism was at its lowest.

The appeal was dismissed.

In his judgment the Master of the Rolls declared that it was settled beyond the possibility of dispute that, in construing regulations like these, it was for the competent authority to decide whether a case for the exercise of his powers had arisen. Those matters are not within the competence of the court. If its decision is reached in good faith, the court cannot interfere. The court had no power to express any opinion on the merits of the case. The Minister was not bound to disclose his reasons, nor could the court inquire into them.

"It is for the competent authority to judge of the adequacy of the evidence before it. It is for the competent authority

<sup>1</sup> (1943), 2 All E.R., at 564.

<sup>2</sup> (1943), 2 All E.R. 546.

Regulation 55 (4) runs: "If it appears to a competent authority that in the interest of the public safety, the defence of the realm, or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community, it is necessary to take control on behalf of His Majesty of the whole or any part of an existing undertaking, and that, for the purpose of exercising such control, it is expedient that the undertaking or part should be carried on in pursuance of an order made under this paragraph, the competent authority may by order authorise any person (hereinafter referred to as an "authorised controller") to exercise, with respect to the undertaking or any part thereof specified in the order, such functions of control on behalf of His Majesty as may be provided by the order . . ."

The case was heard a few days after *Carltona Case*.

to judge of the credibility of that evidence. It is for the competent authority to judge whether or not it is desirable or necessary to make further investigations before taking action. It is for the competent authority to decide whether the situation requires an immediate step, or whether some delay may be allowed for further investigation or perhaps negotiation."<sup>1</sup>

Those powers have been placed by Parliament in the hands of the Minister ; to Parliament he is responsible for their proper exercise.

"One thing is certain, and that is that those matters are not within the competence of this court. It is the competent authority that is selected by Parliament to come to the decision, and if that decision is come to in good faith, this court has no power to interfere, provided, of course, that the action is one which is within the four corners of the authority delegated to the Minister."<sup>1</sup>

In the present case, even if the appellants' evidence were correct, the court could not interfere with the *bona fide* decision of the Minister. The court could not investigate "the adequacy of his reasons" or "the rapidity or the lack of investigation, if it existed, with which he acted." Parliament had withdrawn those matters from the courts and had entrusted them to the Ministers. That was an end of the case. The Minister had put in no evidence, nor was he under obligation to put in evidence, for, even accepting the appellants' evidence, he had no case to answer.<sup>1</sup>

#### 4. Decisions under Act of 1914

(a) In *Sheffield Conservative & Unionist Club, Ltd. v. Brighton*,<sup>2</sup> the Army Council instructed a competent military authority to take possession of the premises of the plaintiff club. Possession was taken ; the furniture was removed and stored ; and the premises were used as offices for inspectors and clerks from Woolwich. The club had protested that more suitable premises might have been taken and they claimed damages for trespass, a declaration that the order was *ultra vires*, and an injunction.

The exigency of military defence, it was argued, did not include housing a clerical staff. The defendant submitted that the work was vitally necessary : the question, "apart from *mala fides* or unreasonable conduct," was one exclusively for the competent military authority, who alone knew the circumstances and was the best judge of the urgency.

It was impossible to say, Ivory, J., declared, that the power was limited to "operations of a military character immediately

<sup>1</sup> (1943), 2 All E.R., at 547.

<sup>2</sup> (1916), 85 L.J.K.B. 1669, 1671.

necessary for the defence of the realm." To distinguish between the supply, and the use, of munitions, was ludicrous ; manufacture must cover clerical work. Concerning *bona fides*, Avory, J., cited the words of Warrington, L.J. :—

"The only condition which it would appear must be fulfilled is that the act in question, having regard to existing circumstances, must be necessary for the public safety and the defence of the realm, and on this matter the opinion of the competent authorities who alone have sufficient knowledge of the facts, provided they act reasonably and in good faith, should be accepted as conclusive."<sup>1</sup>

These words Avory, J., interpreted as meaning—

"provided the competent military authorities act reasonably and in good faith, in such a way that a court of law could not say that they were obviously not acting *bona fide* because they were acting so unreasonably that no honest man could say that they could possibly have so acted."<sup>2</sup>

(b) In *China Mutual Steam Navigation Company v. Maclay*<sup>3</sup> the validity of reg. 39BBB of the Defence of the Realm Regulations was in issue, whereby the Shipping Controller might requisition ships to be used in the manner best suited to the needs of the country. He requisitioned the ships of the plaintiff shipowners, stating that they were to continue to run the vessels as if they were still running for their own account, but for the account of the Government, crediting full earnings and debiting net charges. The company claimed that the particular voyage was for their risk, and that they were entitled to retain the profits.

The regulation, it was contended, was *ultra vires*, in so far as it purported to regulate the manner in which shipowners carried on their business, as distinct from the use to which their ships should be put. Moreover, the order purported to requisition the services of the owners and their servants and was an attempt to tax shipowners without the consent of Parliament.

The *regulation*, Bailhache, J., held, was rightly issued. The scheme, however, was indivisible : it requisitioned three things—ships, services, and profits. Since there was no power to requisition services, the *order* was *ultra vires*.

#### IV. EMERGENCY POWERS OF CONTROL

Hardly any part of the province of contract remains unaffected by the unlimited powers of control conferred by the Defence (General) Regulations, 1939, which are implemented by orders

<sup>1</sup> *In re a Petition of Right* [1915] 3 K.B. 649, 666.

<sup>2</sup> 85 L.J.K.B., at 1672. See *Official Report*, House of Lords, vol. 125, 438, 439.

<sup>3</sup> [1918] 1 K.B. 33, 36.

innumerable made under those regulations.<sup>1</sup> Shipping and aircraft have been brought under complete control; trade by sea is regulated, and employment in British ships and aircraft.<sup>2</sup> "War production undertakings" are subject to the directions of the Minister of Supply.<sup>3</sup> Industry is regulated by a complicated system of the limitation of supplies, the fixing of prices and rationing.<sup>4</sup> Private building is virtually prohibited.<sup>5</sup> Building undertakings work under the directions, as to the conditions of employment, of the Minister of Works and Planning.<sup>6</sup> Employment is under the control of the Minister of Labour and National Service.<sup>7</sup> Trade disputes are referred to a special tribunal.<sup>8</sup> For maintaining essential supplies, the Minister of Agriculture and Fisheries may direct how any land is to be cultivated and he may terminate tenancies.<sup>9</sup>

The significant features of these emergency powers of control will be briefly delineated.

### 1. *Shipping and Aircraft*

The Admiralty regulates navigation by way of "navigation orders," which may provide for

"such incidental and supplementary matters as appear to the Admiralty to be necessary or expedient."<sup>10</sup>

British ships, except under permission, may be prevented from proceeding to sea unless they have complied with specified requirements for their safety.<sup>11</sup> Employment in British ships and aircraft may be regulated by order prohibiting persons of a specified class from being employed on board ships to which the order applies, and prohibiting the employment of any persons or class of persons unless they hold a certificate of identity in the prescribed form.<sup>12</sup> Modifications are made in relation to the engagement and discharge of the crews of merchant ships.<sup>13</sup> Restrictions may be imposed upon the

<sup>1</sup> S.R. & O., 1939, No. 927. *His Majesty's Stationery Office*, 15th ed., 24th March, 1944.

<sup>2</sup> Part III, regs. 43-48, 54.

<sup>3</sup> Regulation 54C.

<sup>4</sup> Regulation 55.

<sup>5</sup> Regulation 56A.

<sup>6</sup> Regulation 56AB.

<sup>7</sup> Regulation 58A.

<sup>8</sup> Regulation 58AA.

<sup>9</sup> Regulations 61, 62, 64.

<sup>10</sup> Regulation 43, para. (1).

<sup>11</sup> Regulation 45, para. (1) (a).

<sup>12</sup> Regulation 45A, para. (1) (a) and (b).

<sup>13</sup> Regulation 45AA, Fourth Schedule.

departure of ships or aircraft ; except with the permission of the statutory authority or person specified in the directions they may not leave any port or place in the United Kingdom.<sup>1</sup>

Agreements for the use or hire of a ship, or for carriage of goods therein, may be controlled.<sup>2</sup> Control is imposed on trade by sea.

British ships may be prohibited, by order, from proceeding to sea except under licence. The order may also contain incidental and supplementary matters "as appear to the competent authority to be necessary or expedient for the purposes of the order."<sup>3</sup> No person lawfully engaged on a British ship, or any ship chartered or requisitioned by or on behalf of His Majesty, may refuse without good cause to join his ship or be absent without leave from his ship, or from his duty at any time.<sup>4</sup> Any British subject, or British protected person in any foreign country, may be directed to perform specified services on such conditions of service as may be directed ; regard must be had to salary, fees or wages for the performance of those services "which appear to be usual," and in particular to any determination of the National Maritime Board.<sup>5</sup> Where a British (other than a Dominion) ship is acquired, chartered or requisitioned by His Majesty, the employment or engagement of the master or the crew will not be terminated, but will continue while the ship is thus under the control of His Majesty.<sup>6</sup> A competent authority may require space or accommodation in a British ship or aircraft to be placed at its disposal, and may give such directions "as appear to the competent authority to be necessary or expedient in connection with any such requirement."<sup>7</sup> The competent authority may transfer to itself the rights and duties of a British subject or corporation who is entitled by charterparty or other contract to possession of the ship or aircraft, or has the right to have articles carried, or to use space or accommodation. Upon the date specified by notice served upon him, the contract will have effect as if the competent authority were a party.

## 2. "*Undertakings*"

"War production undertakings" may be controlled by order of the Minister of Supply ; thereupon the undertaking must be carried on under directions given by a competent authority.<sup>8</sup> These directions may fix the number or the class

<sup>1</sup> Regulation 45C, para. (1).

<sup>2</sup> Regulation 45E, para. (1).

<sup>3</sup> Regulation 46, para. (1).

<sup>4</sup> Regulation 47A, para. (1).

<sup>5</sup> Regulation 47AB, paras. (1), (2) and (3). See also reg. 47AC and reg. 47AD.

<sup>6</sup> Regulation 47AE.

<sup>7</sup> Regulation 54, para. (1). "Competent authority" is defined in para. (5).

<sup>8</sup> Regulation 54C. For definitions, see paras. (2) and (4).



of persons to be employed, the period of employment, the price of articles produced and the remuneration for services rendered<sup>1</sup> ; over statutory or contractual limitations they are paramount.<sup>2</sup>

If a competent authority is satisfied that to improve its efficiency it is expedient to associate with the direction of a war production undertaking carried on by a company persons nominated by the authority, the authority may give directions appointing as a director any person "appearing to the authority to be experienced in the direction of companies."<sup>3</sup> He will hold office for one year, but may be reappointed. This power will not be exercised unless "substantial" public moneys have been spent or will be spent by advance or grant of a capital nature. Such a director will be deemed for all purposes to have been duly appointed, but he will not be entitled to remuneration as director from the company, unless the company otherwise agrees.<sup>4</sup>

### 3. Industry

Industry is controlled by limitation of supplies, fixing of prices, and a comprehensive system of the rationing of food, raw materials and manufactured goods.<sup>5</sup> Control is exercised by specified "competent authorities," who may delegate functions.<sup>6</sup> Powers of control are unlimited ; they include—

"Any incidental and supplementary matters for which the competent authority thinks it expedient for the purposes of the order to provide."<sup>7</sup>

Provision is made for schemes of control ; for the prohibition of regulated acts except under licence ; and for the appointment of "authorised controllers," acting under instructions of the competent authority.<sup>8</sup> The court cannot inquire into the validity of the reasons or the sufficiency of the information upon which the competent authority acted ; if its decision is reached in good faith, the court has no power to interfere, or to express any opinion on the merits of the case. The Minister is not bound to disclose the ground which had influenced his action.

<sup>1</sup> Regulation 54C, para. (1) (a) (i) and (ii).

<sup>2</sup> *Ib.*, para. (1) (b).

<sup>3</sup> Regulation 54CA, para. (1).

<sup>4</sup> *Ib.*, para. (2).

<sup>5</sup> Regulation 55 ; Krusin & Rogers, 633-660 ; II, 747-858 ; III, 232-344 ; IV, 109-180 ; V, 201-282.

<sup>6</sup> Paragraph (5).

<sup>7</sup> Paragraphs (1) (a) and (e). This includes power to fix maximum prices : *T. P. Gilbert & Son, Ltd. v. Birkin, Wilson & Birkin* (1941), 2 All E.R. 489, 495.

<sup>8</sup> Paragraph (4). See *Food Rationing (General Provisions) Order, 1944* (S.R. and O., 1944, No. 843) ; *Limitation of Supplies (Miscellaneous) (No. 21) Order, 1943* (S.R. & O., 1943, No. 909), *ib.*, V, 233-244 ; *The Consumer Rationing (Consolidation) Order, 1944* (S.R. & O., 1944, No. 800).

#### 4. *Building*

The execution for specified purposes of specified operations begun after 6th October, 1940, where the cost exceeds a specified figure, is unlawful, save as authorised by the specified authority.<sup>1</sup> Work of a specified kind begun after 1st January, 1942, unless the total cost does not exceed a prescribed sum, requires a licence by the Minister of Works and Planning, which may be subject to conditions or limitations.<sup>2</sup> Work carried out on behalf of, or under contract with, His Majesty is excepted.<sup>3</sup>

#### 5. *Building and Civil Engineering, Contracting, Undertakings*

No person, after appointed dates, may carry out any work in the course of a building undertaking, or a civil engineering contracting undertaking, unless he has a certificate of registration for this purpose.<sup>4</sup> Before the certificate is granted, the Minister of Works and Planning must be satisfied that the terms and conditions of employment will be neither more nor less favourable than those fixed by joint agreement in the industry, or by arbitration, and that conditions as to hours will be observed as he may direct.<sup>5</sup>

#### 6. *Employment*

The Minister of Labour and National Service, or any National Service Officer, may direct "any person in Great Britain" to perform services specified or described in the direction which, in the opinion of the Minister or Officer, he is capable of performing.<sup>6</sup> The services are to be performed upon conditions of service, including remuneration, as are directed; regard will be had to the salary, fee or wages "which appear to be usual." Where services are rendered under a contract of service, rates will be based upon decisions contained in industrial agreements which apply to persons employed in the same district, capacity and trade; in the absence of such decisions, the conditions prevailing "among good employers in that trade in the district" will be the guide.<sup>7</sup> Provisions may be

<sup>1</sup> Regulation 56A, para. (1), and Sixth Schedule.

<sup>2</sup> Paragraphs (2) and (7).

<sup>3</sup> Paragraph (5).

<sup>4</sup> Regulation 56AB, para. (1). Terms are defined in para. (2).

<sup>5</sup> Paragraph (4).

<sup>6</sup> Regulation 58A, para. (1). This regulation was made under the Emergency Powers (Defence) Act, 1940, on the same date as the Act was passed, 22nd May, 1940. See *Control of Employment (Directed Persons) Order*, 1943 (S.R. & O., 1943, No. 651), *ib.*, V, 286-288; *Control of Employment (Notice of Termination of Employment) Order*, 1943 (S.R. & O., 1943, No. 1173), *ib.*, V, 288-291.

The court is not entitled to consider the reasonableness of the direction or whether the person directed acted reasonably in refusing to comply: *Horton v. Owen* [1943] 1 K.B. 111, 114.

<sup>7</sup> Paragraph (2).

made for regulating the engagement of workers, and the duration and situation of their employment.<sup>1</sup> Finally, provision may be made for securing that enough workers are available in undertakings engaged in "essential work"; that they continue to be employed therein; that they are prohibited from absenting themselves "without reasonable excuse," or from being "persistently late," or from refusing to work reasonable overtime or to obey lawful orders.<sup>2</sup>

### 7. *Strikes and Lockouts*

To prevent work from being interrupted by "trade disputes," the Minister of Labour and National Service may, by order, establish a tribunal to settle trade disputes. He may prohibit, subject to the order, a strike or lockout arising out of a trade dispute. Employees may be required to observe such terms and conditions as may be determined to be not less favourable than the recognised terms and conditions. He may provide for recording departures from any rule, practice or custom relating to employment. And he may, by order, provide for—

"any incidental supplementary matters for which [he] thinks it expedient for the purpose of the order to provide."<sup>3</sup>

*The Conditions of Employment and National Arbitration Order*, 1940, set up the National Arbitration Tribunal (of which Lord Simonds was chairman).<sup>4</sup> An existing or apprehended trade dispute<sup>5</sup> may be reported to the Minister, who may refer

<sup>1</sup> Paragraph (4). See *The Undertakings (Restriction on Engagement) Order*, 1941, S.R. & O., 1941, No. 2069, *ib.*, 244-247, which applies to building, civil engineering, contracting, electrical installation, and general engineering undertakings. See also *The Employment of Women (Control of Engagement) Order*, 1943, S.R. & O., 1943, No. 142, *ib.*, V, 292-295, which prevents the engagement of any woman for employment over 18 and under 41, otherwise than through an employment exchange or an approved employment agency.

<sup>2</sup> See *The Essential Work (General Provisions, (No. 2) Order*, 1942, S.R. & O., 1942, No. 1594, which empowers the Minister to enter the name of undertakings in a Schedule of Undertakings and to make provisions concerning the conditions of employment therein and a guaranteed minimum wage. It prevents the termination (except for "serious misconduct"), or the leaving of employment except with the permission in writing of a National Service Officer. Appeal lies to a "Local Appeal Board." See also S.R. & O., 1944, No. 815. The 1941 Order (S.R. & O., 1941, No. 302) has been adapted to particular classes of undertakings: *building and civil engineering; coalmining; dock labour; electrical contracting industry; iron and steel industry; merchant navy; railway undertakings; ship-building and ship-repairing; cotton-manufacturing industry; boot and shoe industry.*

See Krusin & Rogers, IV, 188-196; List of Orders, at 196; V, 291.

<sup>3</sup> Regulation 58AA, para. (1).

<sup>4</sup> S.R. & O., 1940, No. 1305, art. 1. For constitution, see *Schedule*, amended by S.R. & O., 1941, No. 1884, and for the new meaning of "trade dispute." For the wide jurisdiction of this tribunal, see *National Association of Local Government Officers v. Bolton Corporation* [1943] A.C. 166.

<sup>5</sup> See definitions in art. 7.

the matter to the tribunal.<sup>1</sup> Where other steps have been taken to promote a settlement which have not resulted in a prompt settlement, the Minister must refer the dispute to the tribunal unless, in his opinion, "special circumstances" render postponement necessary or desirable.<sup>2</sup> The award will be binding upon the employers and the workers to whom it relates: it becomes "an implied term of the contract" that the rate of wages and the conditions of employment shall be in accordance with the award.<sup>3</sup> Strikes and lockouts arising out of a trade dispute are prohibited unless the dispute has been "reported" and twenty-one days have elapsed, and the dispute has not been referred by the Minister to the tribunal.<sup>4</sup>

All employers must observe the "recognised terms and conditions" in a trade or industry (or terms and conditions which are not less favourable), where, in any district, these have been settled by negotiation or arbitration between representative bodies of employers and trade unions.<sup>5</sup> Any question as to these terms and conditions, or whether they are being observed, may be reported to the Minister and may be referred by him to the tribunal: the award becomes an implied term of the contract between the employers and the workers concerned.<sup>6</sup>

Where, in any trade or industry, during the "present emergency" any "departure from a trade practice" has occurred, the departure may be "recorded" in a memorandum, endorsed or accompanied by a counter-memorandum by other organisations or employers affected, and deposited at a local office of the Ministry of Labour.<sup>7</sup>

In default of agreement a duly authorised officer of the Minister may prepare and deposit a memorandum.

### 8. *Agriculture*

The Minister of Agriculture and Fisheries may direct that, except with permission,<sup>8</sup> agricultural land shall not be used otherwise than as agricultural land. He may give directions concerning the cultivation, management or use of land for agricultural purposes,

"as he thinks necessary or expedient for the purpose of promoting, increasing or maintaining the production in the

<sup>1</sup> Regulation 58AA (S.R. & O., 1940, No. 1305), Article 2 (2), (3).

<sup>2</sup> Article 2 (4).

<sup>3</sup> Article 2 (5).

<sup>4</sup> Article 4.

<sup>5</sup> Article 5 (1).

<sup>6</sup> Article 5 (4). See *Hulland v. W. Saunders & Son* (1944), 2 All E.R. 568.

<sup>7</sup> Article 6.

<sup>8</sup> Regulation 61.

United Kingdom of articles necessary for the efficient prosecution of the war or for maintaining supplies and services essential to the life of the community.”<sup>1</sup>

If the tenant of an agricultural holding has contravened or has not complied with any directions, the Minister may serve a notice on the landlord and the tenant, terminate the tenancy on a specified date, and direct the tenant to give up possession.<sup>2</sup> The same power exists where “it appears at any time” to the Minister that the tenant is not cultivating according to the “rules of good husbandry.”<sup>3</sup> This is to be treated as a termination under the Agricultural Holdings Act, 1923; the rights of the landlord and tenant under that Act will apply.<sup>4</sup> When the Minister, in the exercise of his emergency powers, comes into possession of any land, he may make a contract with any person for its occupation; the occupier then becomes the tenant of the other party.<sup>5</sup> Where the whole or part of an agricultural holding is subject to a contract of sale made since 3rd September, 1939, or where it has been sold under a contract made since that date, any notice to quit after 31st December, 1941, is void, except with the written consent of the Minister.<sup>6</sup> A local authority in occupation of any land (despite any statute or instrument to the contrary) may adapt the land for allotment gardens, or let it for use by the tenant as allotment gardens, or may cultivate it to raise a crop of an approved kind.<sup>7</sup> Any tenancy created under this regulation, upon the expiry of the regulation will cease; the tenant will have the same rights of compensation as he would have by the termination of that of his landlord.<sup>8</sup>

War Agricultural Executive Committees have been set up to exercise the powers of the Minister in the administrative counties.<sup>9</sup>

## V. OVERRIDING CONTRACTUAL OBLIGATIONS

Defence Regulations, and orders, rules and bye-laws duly made under them, by the express terms of the Emergency Powers

<sup>1</sup> Regulation 62, para. (1). For definitions, see para. (5). The court has no power to inquire into the reasonableness of the direction: *Minister of Agriculture and Fisheries v. Price* [1941] 2 K.B. 116.

<sup>2</sup> Paragraph (1A).

<sup>3</sup> Paragraphs (2) and (5).

<sup>4</sup> Paragraph (3).

<sup>5</sup> Paragraph (3A).

<sup>6</sup> Paragraph (4A). In giving “consent,” the Minister is not acting judicially, and the tenant is not entitled to be heard: *Irving v. Patterson* [1943] Ch. 180.

<sup>7</sup> Regulation 62A, para. (1) (a) (b) (c). For definition, see para. (2).

<sup>8</sup> Paragraph (3).

<sup>9</sup> The Cultivation of Lands Order, 1939 (S.R. & O., 1939, No. 1078).

(Defence) Acts, 1939 and 1940, are paramount. They have effect

“notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument having effect by virtue of any enactment other than this Act.”<sup>1</sup> Powers conferred by many Defence Regulations are expressly stated to be exercisable notwithstanding any contractual limitation, restriction or obligation to the contrary.

### 1. *Billeting*

(a) Where a room is required by billeting notice to be devoted exclusively to the accommodation of any person then, “notwithstanding anything in any contract,” while the requirement is in force no other person is entitled to occupy the room.”<sup>2</sup>

(b) Where, for the purpose of billeting or lodging persons engaged in essential work, the Minister of Health has specified an area, any person may be directed not to use any premises in the area for sleeping or residence except with permission or under conditions.<sup>3</sup> A person prevented, under direction, from using premises for sleeping or residence will not be liable for any periodical sum for their use or otherwise.<sup>4</sup>

### 2. *Work on Land*

(a) A person authorised by a “competent authority,” and any member of His Majesty’s Forces acting in the course of his duty as such, may, for the purposes of the war, do any work on any land.<sup>5</sup> Except with permission, no person may tamper with any work so done, and the person occupying the land will not be subject to any liability or obligation because, as a result of the doing of the work, the land is in a dangerous condition.

(b) A competent authority has power to sever from land fixtures required for war purposes.<sup>6</sup> Where fixtures have thus been severed, any obligation imposed by a lease or other instrument affecting the land, to maintain, repair, or deliver up in repair the land, and any liability relating to waste, will be extinguished: gone the duty to replace or to provide a substitute or to pay damages or a penalty or to suffer a forfeiture. Any guarantee will likewise be extinguished. This applies to

<sup>1</sup> Section 2 (4), as amended.

<sup>2</sup> Regulation 22, para. (2). A person aggrieved may complain to a “Billeting Tribunal” (para. (9)).

<sup>3</sup> Regulation 22A, paras (1) and (2). A person aggrieved may complain to the Billeting Tribunal (para. (3)).

<sup>4</sup> *Ib.* para. (7).

<sup>5</sup> Regulation 50, paras. (1) and (3). The “doing of work on land” is defined in para. (4). Compensation is payable to the person who, for the time being, is entitled to occupy the land: Compensation (Defence) Act, 1939, s. 3.

<sup>6</sup> Regulation 50B, paras. (1) and (2).

an obligation imposed by instrument. An obligation imposed by statute will not be extinguished but will be suspended.

### 3. Taking Possession of Land

(a) A competent authority, "if it appears to that authority to be necessary or expedient so to do in the interests of the public safety, the defence of the realm, or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community," may take possession of any land and give such directions as appear to it to be necessary or expedient in connection with taking possession.<sup>1</sup> While any land is in the possession of the competent authority, under this regulation or under the prerogative, the land may be used

"notwithstanding any restriction imposed on the use thereof (whether by any Act or other instrument or otherwise)" for the purpose and in the way that the authority "think expedient" in the above interests.

A "requisition notice" is not necessary in law. In the absence of bad faith, a requisition ostensibly authorised by a competent authority, cannot be impugned.<sup>2</sup>

(b) Under the Landlord and Tenant (Requisitioned Land) Act, 1942, where possession of all the land comprised in a lease to which the Act applies has been taken under emergency powers, and the land, immediately before possession was taken, was being used by a tenant or a member of his family as his residence or for his business, or partly for the one and partly for the other, the tenant may, within three months of the material date, serve on the landlord a *notice of disclaimer*, if possession of the land is still retained under emergency powers.<sup>3</sup>

The Act only applies to a lease which provides that the term will end, or may be determined, (A) not later than *five years after the material date*; or (B) at the end, or not later than, *twelve months after the end of any war* in which His Majesty may be engaged.<sup>4</sup>

<sup>1</sup> Regulation 51. The power is effectively exercised by *notice*: *Jami's Macara Ltd. v. Barclay* [1945] 1 K.B. 148, 154, *per* Uthwatt, J. (for Court of Appeal). Possession may be taken by requisition, although the owner is willing to give possession subject to agreement: *Ouardi v. Kavala, Ltd. v. Grigg* [1945] 1 K.B. 157, 164, *per* Atkinson, J.

<sup>2</sup> *Carltona Case* (1943), 2 All E.R. 560, 562, *per* Lord Greene, M.R., *supra*, 68.

<sup>3</sup> Section 1 (1). The landlord may, within one month of service, ask the court to determine whether the notice is of no effect because it does not comply with the statutory conditions (subs. (3)). Where possession of *part* only of the land comprised in a lease has been taken under emergency powers, the court, on the tenant's application within three months from the material date, may direct that s. 1 should apply.

This statute was passed as a result of a recommendation in the Report of Mr. John W. Morris, K.C., on *Requisitioning and Compensation* (1941), 'cmd. 6313, para. 18.

<sup>4</sup> Section 11.

The "*material date*" is the date of the passing of the Act, if possession had already been taken ; in any other case, the date when possession is taken.<sup>1</sup>

A notice of disclaimer, if not determined to be invalid, becomes effective at the end of one month from the service of the notice : as from the material date the lease disclaimed will be deemed to have been surrendered and all interests in or derived out of the term will be deemed to have been extinguished.<sup>2</sup> The court may, on terms, vest the lease in a person having a mortgage or charge, and, *on the application* of either the landlord or the tenant, make *adaptations or modifications* (as the court thinks just) of any term in the lease relating to *repairing obligations* or imposing liability on either party, to take effect on the surrender of the lease.<sup>3</sup>

The Act provides for the disclaimer of land comprised in a *multiple lease*<sup>4</sup> ; for cases where land is *requisitioned by stages*<sup>5</sup> ; for the *apportionment of rent*<sup>6</sup> ; for the right of the tenant, during the currency of the lease or afterwards, *to remove buildings or fixtures* annexed to the land.<sup>7</sup> Where possession of land has been taken under emergency powers and the lease required the landlord to pay rates and taxes, or defray the cost of repairs or insurance, or to provide services, the *contractual rent will be reduced to the net rent* by agreement between the landlord and tenant, or, in default, as determined by the court. The "*net rent*" means the rent which might reasonably have been payable under the lease if the tenant had been wholly liable for rates and taxes and the landlord had not been required to provide any services.<sup>8</sup>

(c) By the Landlord and Tenant (Requisitioned Land) Act, 1944, where possession of land comprised in a lease has been taken under emergency powers, *while possession is retained no remedy for breach of repairing covenant* is enforceable for damage occurring during that period. If, while possession is retained, the lease determines, or if, upon de-requisition of the land,

<sup>1</sup> Landlord and Tenant (Requisitioned Land) Act, 1942, s. 13 (1).

<sup>2</sup> Section 2 (4) (a) (b) (c)

<sup>3</sup> Section 2 (4) (a) (b) (c). See *Looker v. R.* [1945] 1 K.B. 39.

<sup>4</sup> Section 3.

<sup>5</sup> Section 4 (1).

<sup>6</sup> Section 6 (1).

<sup>7</sup> Section 7 (1).

<sup>8</sup> Section 8 (1). By subs. (2), where the competent authority requires the landlord to continue to provide services (other than board and furniture), they must pay a sum equal to part of the rent, as may be agreed, or, in default, a sum determined by the court. This provision does not apply where the lease has been disclaimed. A tripartite agreement in respect of services may be made between the authority, the landlord and tenant (subs. (3)).



compensation becomes payable to the person entitled to the benefit of the covenant,<sup>1</sup> *no remedy for that damage will at any time be enforced.*<sup>2</sup>

Where possession of such land so taken has been given up during the currency of the lease, and compensation for damage is payable to a person other than the tenant, then if the tenant has incurred expenditure in making good any of the damage, he may recover an equal amount from that person within the limit of the compensation.<sup>3</sup>

#### 4. Requisitioning of other Property

A competent authority may, for similar emergency purposes, requisition (a) any chattel in the United Kingdom (including any vessel or aircraft and anything on board); (b) any British ship or aircraft or anything on board, wherever the ship or aircraft may be, and may give such directions as appear to it to be necessary or expedient in connection with the requisition.<sup>4</sup> Where any property is thus requisitioned, or is at the disposal of a competent authority under the prerogative, the authority may use or deal with the property for the purpose and in the way that the authority "thinks expedient" for the above purposes. It may hold, or sell, or dispose of the property as if the authority were the owner and

"as if the property were free from any mortgage, pledge, lien or other similar obligation."

Where the property requisitioned was a vessel, vehicle or aircraft, the authority may acquire it by serving on the owner a notice of acquisition. Upon the service of notice of acquisition, the vessel, vehicle or aircraft will vest in the competent authority "free from any mortgage, pledge, lien or other similar obligation."

<sup>1</sup> Compensation (Defence) Act, 1939, s. 2 (1) (b), which entitles the person who is then the "owner" of the land (s. 17 (1)) to "a sum equal to the cost of making good any damage to the land," excepting "fair wear and tear" and "damage caused by war operations" (s. 17 (1)).

<sup>2</sup> Landlord and Tenant (Requisitioned Land) Act, 1944, s. 1 (1). The section is retrospective as from 24th August, 1939 (subs. (2)). "Damage" excludes "war damage" (s. 5).

<sup>3</sup> Section 2 (1).

<sup>4</sup> Regulation 53, paras. (1) and (2). "The competent authority" is defined in para. (5). Compensation is payable under s. 4 or s. 6 of the Compensation (Defence) Act, 1939. Growing timber agreed to be severed under a contract of sale is not "goods" within the meaning of the Act (s. 17 (1)), but is part of the land: upon the requisition of a vehicle see *Lane v. Minister of War Transport* [1942] Ch. 280, 354. *Estates Gazette*, 27th June, 1943, at pp. 618, 619.

Upon the requisition of a ship, see *France, Fenwick & Co. v. R.* [1927] 1 K.B. 458, 464, 465, *per* Wright, J.; *Nicolaou v. Minister of War Transport* (1944), 2 All E.R. 322, 327, *per* Tucker, J.

### 5. *Powers as to Ships and Aircraft*

The competent authority may require space or accommodation in a British ship or aircraft to be placed at its disposal.<sup>1</sup> Where a charterparty or other contract subsists under which a British subject or corporation is entitled to possession of the ship or aircraft, or has the right to have articles carried, or to use space or accommodation, the competent authority may serve on that person a notice stating that on a specified date his rights and liabilities will be transferred to the competent authority. The contract will thereupon have effect, as if the competent authority, instead of that person, were a party.

Power is given to direct any British subject or British protected person abroad to perform specified services in British (excluding Dominion) ships, which, in the authority's opinion, that person is capable of performing.<sup>2</sup> Where a person, required to perform services or accept employment as a member of the crew, joins the ship, but neglects or refuses to sign the statutory agreement with the crew, a note will be inserted in place of his signature, authenticated as if it were a signature, indicating failure to sign and the nature of the requirement. The agreement will then have effect as if he had signed it and he will be deemed to be lawfully engaged as a member of the crew.<sup>3</sup>

Where a British ship is acquired, chartered, or requisitioned, on behalf of His Majesty, the employment or engagement of any member of the crew will not be terminated, but, unless the Minister of War Transport directs otherwise, the agreement of service will have effect for the period during which the ship is owned, chartered, or requisitioned, on behalf of the Crown. This will not apply where the agreement would have expired by effluxion of time.<sup>4</sup>

### 6. *Power to permit Nuisance*

Where the competent authority is satisfied that for war purposes particular work must be carried on at a particular place and that the carrying on of the work causes or may cause a nuisance, the work, subject to certain provisos, and notwithstanding the nuisance, may be authorised.<sup>5</sup> Where an order authorising the work has thus been made, no legal proceedings for the abatement or prohibition of any nuisance caused by the work shall be entertained by any court.<sup>6</sup> The same rule will apply to

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<sup>1</sup> Regulation 54, paras. (1) and (2). Compensation is payable under s. 5 of the Compensation (Defence) Act, 1939.

<sup>2</sup> Regulation 47AB, para. (1).

<sup>3</sup> Regulation 47AC, paras. (1) and (2).

<sup>4</sup> Regulation 47AE.

<sup>5</sup> Regulation 54A, para. (1).

<sup>6</sup> *Ib.*, para. (2).

“proceedings for the enforcement of an express covenant not to commit nuisance or for the recovery of damages in respect of a breach of such a covenant.”<sup>1</sup>

### 7. *Power of Water Undertakers*

To maintain an adequate supply of water in order to meet an actual or apprehended attack by the enemy, water undertakers may secure, by agreement or under directions of the Minister of Health, the use of the water in any well, river, stream or lake, and the construction of such works as appear to them to be necessary.<sup>2</sup> These powers may be exercised although the sources of supply and the works to be constructed are limited by statute or instrument and

“notwithstanding any other limitation imposed upon them by or by virtue of any such Act or instrument.”

### 8. *Controlled Undertakings*

The Minister of Supply if satisfied that it is expedient, may by order, declare any “war production undertaking” (or any class or description of such undertakings) to be “controlled.”<sup>3</sup> A competent authority may give orders and directions in accordance with which the undertaking must be carried on.

“No obligation or limitation imposed on the undertakers by or by virtue of any Act or other instrument determining their functions shall prevent or excuse the undertakers from complying with any such order or directions.”

To improve the efficiency of such an undertaking, a competent authority, if it is satisfied of the expediency, may appoint as a director for one year any person appearing to the authority to be experienced in the direction of companies. He will be deemed to have been duly appointed under the articles and is eligible for reappointment. Such appointees must not constitute a majority on the board and in any case must not exceed three. This power cannot be exercised unless public moneys “substantial” in the authority’s opinion, either have been, or will be, spent by way of advance or capital grant.<sup>4</sup>

### 9. *Public Utility Undertakings*

The competent authority, and any person authorised by it, may give directions to secure that a public utility undertaking is carried on in the way that the authority thinks proper in the interests of the public safety, the defence of the realm, or the

<sup>1</sup> Regulation 54A, para. (4). It is submitted that despite *Chester v. Bateson*, *supra*, 61-63, this regulation is *intra vires*.

<sup>2</sup> Regulation 54AB, paras. (1), (2) and (3).

<sup>3</sup> Regulation 54C, para. (1) and sub-para. (b). Terms are defined in para. (4), “competent authority” in para. (2).

<sup>4</sup> Regulation 54CA.

efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community.<sup>1</sup> In these interests, the authority may, by order,

“relax any obligation or limitation imposed . . . by or by virtue of, any Act or other instrument determining the function of the undertakers . . .”

#### 10. *Diversion of Consignments of Coal*

If the Minister of Fuel and Power thinks that any particular consignment of coal, on the premises of a railway undertaking in the course of transit, (a) cannot, owing to an actual or apprehended attack by the enemy, be carried within a reasonable time to its destination ; and (b) that it is expedient that it should be made available elsewhere, he may arrange that the consignment be sent to a “new consignee,” and serve a notice to that effect upon the consignor, the original consignee, and the railway undertaking.<sup>2</sup> The consignment will then be “deemed to have been sold by the owner to the new consignee at the price fixed by the contract . . . less the amount (if any) attributable to the cost of the carriage and delivery of the consignment from the place where it was first put on rail.” The terms of the contract relating to quantity and description apply. Any dispute will be determined by the Minister. The railway undertaking must arrange for delivery to the new consignee and can recover from him delivery charges to the new destination. The original consignee must be repaid the price that he has paid comprising the cost of carriage and delivery. If he has not paid, he will not be liable to pay.

#### 11. *Continuance in Essential Employment Abroad*

British subjects and other specified persons who are employed by persons carrying on any “essential undertaking,” shall, “whether or not (they are) bound by contract to do so,” continue in their employment unless the Secretary of State, or someone with his authority, consents to their leaving. Consent must not be refused unless the Secretary of State or the person authorised is satisfied that the employers would continue the employment on reasonable terms.<sup>3</sup>

#### 12. *Termination of Agricultural Tenancies*

For the powers of the Minister of Agriculture and Fisheries to terminate a tenancy, see pp. 79–80, *supra*.

<sup>1</sup> Regulation 56, para. (1). “The competent authority” is defined in para. (4).

<sup>2</sup> Regulation 56B, paras. (1) and (2). Despite *Chester v. Bateson*, *supra*, 61–63, it is submitted that this regulation is *intra vires*.

<sup>3</sup> Regulation 58Ac, para. (1). Terms are defined in paras. (2) and (3).

### 13. *Power of Local Authority to cultivate and to let*

A local authority in occupation of land

"notwithstanding anything in any Act . . . or any trust or covenant or restriction affecting the land,"

may, *inter alia*, let the land as allotment gardens either to tenants or to a society which cultivates vacant land for the purpose of sub-letting for such use. It may cultivate the land for the purpose of raising an approved crop<sup>1</sup>; this power extends to any land which the authority is authorised by the person entitled to possession to use for this purpose, as well as land of which emergency possession has been taken. This authorisation may be given "notwithstanding anything in any Act . . . or any trust or consent or restriction affecting the land."<sup>2</sup> A tenancy created under this regulation will cease, if in force, when the regulation expires; the tenant will have the same rights of compensation as he would have had on the termination of his tenancy by the termination of that of his landlord.<sup>3</sup>

### 14. *Control of Undertakings*

Where a competent authority has authorised "an authorised controller" to control an undertaking, and the authority is satisfied that it is necessary to secure effective control, a person obstructing the controller may be removed from office and another person appointed in his stead and, with the consent of the Treasury, the authority may transfer the shares of the company to its nominees as specified in the order.<sup>4</sup> The shares, from the specified date, will vest in the transferees on behalf of the competent authority "free from any mortgage, pledge or charge." The transferors will be entitled to be registered as members without delivery to the company of any instrument of transfer. The price will be specified in an order by the Treasury and shall be not less than the value as between a willing buyer and a willing seller at the date of the order.<sup>5</sup>

<sup>1</sup> Regulation 62A, para. (1) (b) and (c). For definition, see para. (2).

<sup>2</sup> *Ib.*, para. (1A).

<sup>3</sup> *Ib.*, para. (3).

<sup>4</sup> Regulation 78, para. (1) (a) and (b); para. (4) (a).

<sup>5</sup> *Ib.*, para. (5).

## CHAPTER III

### ENEMY CHARACTER

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#### I. WHO IS AN ENEMY?

To answer this question accurately, one must first ask another: Are we thinking of the *personal* rights and liabilities of X, e.g., whether he may be interned? Or do we wish to know his *civil* rights, e.g., whether he may contract, and what is the effect of war upon his contracts?

If X is the subject of a State at war with His Majesty, *politically* he is an alien enemy subject to disabilities under the Aliens Restriction Acts, 1914 and 1919, and the Aliens Order, 1920 (as amended).<sup>1</sup>

But suppose X, voluntarily residing or carrying on business in England, duly registers as an enemy alien and is exempt from internment. *Politically*, an alien enemy, for the purpose of *civil* rights he is not treated as an alien enemy. The test for civil purposes is not nationality; the test is: where does he reside or carry on his business?<sup>2</sup>

<sup>1</sup> Aliens Order, 1920, (S.R. & O., 1920, No. 448), consolidated up to and including S.R. & O., 1939, No. 994, and orders made thereunder.

<sup>2</sup> McNair 38-39 2 Pitt Cobbett 26, 31, 32.

### 1. *Enemy Nationality*

An "*enemy subject*," that is, a person who is *politically* or by nationality, an alien enemy, is defined by statute as follows :—

"(a) an individual who, not being either a British subject or a British protected person, possesses the nationality of a State at war with His Majesty,<sup>1</sup> or

(b) a body of persons constituted or incorporated in, or under the laws of, any such State."<sup>2</sup>

For the purpose of the law of contracts, the test of "enemy character" in war is not the nationality of a person but his *commercial domicile*—irrespective of his nationality.<sup>3</sup> A person who resides in a country, paying taxes and perhaps owning property, is regarded for the purposes of war, whatever his nationality, as a member of that State.

"A foreigner living and established within the territory of a State is to a large extent under its control; . . . he contributes by way of payment of ordinary taxes to its support, and his property is liable, like that of subjects, to such extraordinary subsidies as the prosecution of a war may demand. His property being thus an element of strength to the State, it may reasonably be treated as hostile by an enemy. Conversely, when the foreigner lives in a neutral country, he is so far subject to its sovereignty that it can restrain him from taking advantage of its territory to do acts of hostility against the enemy of his State and it is responsible for his acts, if he does them. For the purposes of the war, therefore, he is in reality a subject of the neutral State."<sup>4</sup>

### 2. *Enemy Character*

The term "*enemy*" has been defined for the purposes of the *Trading with the Enemy Act, 1939*, as follows :—

<sup>1</sup> Compare the definition of "enemy alien" for the purposes of the Treachery Act, 1940, s. 5 (1).

<sup>2</sup> Trading with the Enemy Act, 1939, s. 15 (1).

<sup>3</sup> 2 Pitt Cobbett, 34. See the judgment of Scrutton, L.J., in *Tingley v. Muller* [1917] 2 Ch. 144, 172, 173 (approved by Lord Wright in *The Soufracht Case* [1943] A.C. 203, 236). In the time of Grotius, allegiance was the test of "alien enemy." "But with the growth of commerce and greater tenderness to private property an alleviation or exception was introduced into the rule of allegiance or nationality. An alien enemy by allegiance could lose his enemy character for the time being if he was residing in the King's dominions or trading there by the licence of the Crown . . . A subject by allegiance could for the time being lose his friendly or national character by residing or trading in the enemy's dominions. Either party by trading or residing in a neutral country might acquire for the time a neutral character . . . The conditions of this character are sometimes called 'domicil,' i.e., "commercial domicile." And see *The Soufracht Case*, *supra*, per Lord Porter.

<sup>4</sup> Hall, *International Law*, ed. Pearce Higgins, 8th ed. (1924), 587.

"(a) any State,<sup>1</sup> or Sovereign of a State, at war with His Majesty,

(b) any individual resident in enemy territory,<sup>2</sup>

(c) any body of persons (whether corporate or unincorporate) carrying on business in any place, if and so long as the body is controlled by a person who, under this section, is an enemy, or

(d) any body of persons constituted or incorporated in, or under the laws of, a State at war with His Majesty,<sup>3</sup>

<sup>1</sup> In the Trading with the Enemy Act, 1917 (as amended), of the United States, "enemy" is defined in s. 2 as follows:—

"(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

"(b) The government of any nation with which the United States is at war, or any political or municipal sub-division thereof, or any officer, official, agent, or agency thereof.

"(c) Such other individuals, or body or class of individuals, as may be natives, citizens or subjects of any nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term 'enemy.'"

For text, see Domke, Appendix A, 385-429; *Ex parte Don Ascanio Colonna* (1942), 62 S. Ct. 373, *A.J.I.L.*, vol. 36, 489, where, after the outbreak of war with Italy, the motion of the Italian ambassador for leave to file a petition for prohibition and mandamus, claiming immunity for an Italian steamship, was refused: Domke, chap. 2, *Enemy Governments and their Agencies*.

But see the broader definition of "enemy national" in General Ruling No. 11, issued by the Treasury Department in 1942, which *supersedes the statutory definition*: Domke, Appendix F, 445-447.

In the United States the new concept "enemy national" replaces the term "enemy" of the last war. This includes not merely the government of any country against which the United States has declared war, but also the government of any other *blocked* country having its seat within enemy territory, any individual *within* enemy territory and any person whose name appears on "The Proclaimed List of Certain Blocked Nationals." "Enemy territory" includes territory "controlled or occupied by the military, naval or police forces or other authority of Germany, Italy or Japan." See *infra*, 130, 131.

See Lourie, *The Trading with the Enemy Act*, Michigan L. Rev. (1943), vol. 42, 205-234.

Before the United States was at war, the President had made "freezing regulations" restricting transactions with allies of Germany and Italy: Domke, 15 and Appendix C, *Executive Order No. 8389*, 432-438; *A.J.I.L.*, vol. 34 (1940), *Supp.*, 168-170. This control was extended to nearly all the countries of Europe (except Turkey) by 14th June, 1941 (Domke, 27), and on 21st December, 1941, to occupied countries.

<sup>2</sup> "Resident within enemy territory" becomes, in General Ruling No. 11 (note 1, above), "individual *within* enemy territory."

Under the "freezing" regulations, the Secretary of the Treasury has power to determine that *any person* (sc. even a citizen of the United States) "is or shall be deemed to be a national within the meaning of this definition" (Domke, 48).

<sup>3</sup> For example, a firm registered as a German firm in accordance with German law and with extra-territorial rights at the German consulate in Shanghai: *The Eumaeus* (1915), 85 L.J.P. 130, 133, 134, per Sir S. Evans, P.



(e) as respects any business carried on in enemy territory, any individual or body of persons (whether corporate or unincorporate) carrying on that business.”<sup>1</sup>

But the term “does not include any individual by reason only that he is an enemy subject.”<sup>2</sup>

The definition is not exhaustive, for the Board of Trade may, by order,<sup>3</sup> direct that any *person specified* in the order shall, for the purposes of the Act, *be deemed to be, while so specified, an enemy.*<sup>4</sup>

It is still material to consider who, at common law, is an alien enemy :

“The common law existed before and irrespective of the statutory provisions now in force.”<sup>5</sup>

### 3. Commercial Domicil

“*Commercial domicil*” is an “anomalous species of domicil which springs into being during war.” “Domicil” means

<sup>1</sup> Enemy character is *divisible* (see Blum & Rosenbaum, 7 *et seq.*). In *The Portland* (1800), 3 C. Rob. 41, 44, 45, a neutral, having business connections with Ostend, then enemy territory, was liable to have seized only those ships trading with Ostend. “I know of no case, nor of any principle,” said Sir W. Scott, “that could support such a position as this, that a man, having a house of trade in the enemy’s country, as well as in a neutral country, should be considered in his whole concern as an enemy merchant, as well in those which respected solely his neutral house as in those which belonged to his belligerent domicil.”

The neutral partner trading in an enemy country is an alien enemy : *The Anglo-Mexican* [1918] A.C. 422, 424, *per* Lord Parker.

Where a neutral company has branch offices, one of which is in an enemy country, it is a question of fact whether particular goods are so connected with the enemy branch as to render them liable to condemnation as enemy property : *The Lützow* [1918] A.C. 435, 443, *per* Lord Sumner.

<sup>2</sup> Section 2 (1), as amended by the Defence (Trading with the Enemy) Regulations, 1940 (S.R. & O., 1940, No. 1092).

<sup>3</sup> The following orders were in force on 10th February, 1945 : The Trading with the Enemy (Specified Persons) (Amendment) (No. 1) Order (S.R. & O., 1945, No. 11) ; (Amendment) (No. 2) Order (S.R. & O., 1945, No. 46) ; (Amendment) (No. 3) Order (S.R. & O., 1945, No. 54).

<sup>4</sup> Section 2 (2) : cf. Presidential Proclamation No. 2497 (Domke, Appendix J, 455-457) authorising a Proclaimed List of Certain Blocked Nationals. See Domke, chap. 10, *Blacklisted Individuals and Corporations*, 145-153. By General Ruling No. 11, s. 2 (a) iv, “enemy nationals” include “any person whose name appears on the Proclaimed List of Certain Blocked Nationals and any other person acting therefor” (Domke, 148, 149). The blacklisting system, says Domke, “in effect supplements the application of the control test and of the doctrine of ‘acting for the benefit of an enemy’” (at 150). See also, Higgins and Colombos, *The International Law of the Sea*, 1943, 400-402.

The Government will retain “*The Black List*” for a period after the end of organised resistance in Germany. The United States Government have taken a similar decision upon the continuance of the Proclaimed List of Certain Blocked Nationals. In September, 1944, the Black List consisted of 15,000 names of companies, firms and persons in various parts of the world : *The Times*, 27th September, 1944.

<sup>5</sup> *Per* Lord Wright in *The Soufracht Case* [1943] A.C. 203, 225.

"residence in a country with an intention of remaining there indefinitely," but

" 'a commercial domicile' is possessed by any person, even a British subject or a neutral, who is voluntarily and actually resident, or who carries on business, in the hostile country." <sup>1</sup> As Lord Parker says:—

"Voluntary residence among the enemy, however passive or pacific he may be, identifies an English subject with His Majesty's foes."<sup>2</sup>

For civil purposes he will be regarded as an alien enemy; thus, also, a neutral who, though not living in enemy territory, is interested in a business upon enemy territory.<sup>3</sup>

Cheshire points out the differences between "commercial domicile" and domicile proper, which he calls "civil domicile."<sup>4</sup> First, in constituting commercial domicile, "time," said Sir W. Scott, "is the grand ingredient."<sup>5</sup> A man may, for a "special purpose," come into a belligerent country before a war, "but if he continues to reside during a good part of the war, contributing, by means of taxes and other means, to the strength of that country, I am of opinion that he could not plead his special purpose with any effect against the rights of hostility."

Secondly, even residence may be unnecessary—

"A neutral, wherever resident, may, if he owns or is a partner in a house of business trading in or from an enemy country, be properly deemed an enemy in respect of his property or interest in such business." He acquires by virtue of the business a commercial domicile in the country in or from which the business is carried on, and this commercial domicile, though it does not affect his property generally, will affect the assets of the business house or his interest therein with an enemy character."<sup>6</sup>

Thirdly, a man may have mercantile concerns in two countries; if he trades with both, he must be regarded, in relation to his

<sup>1</sup> Cheshire, 204-206; Hall, *op. cit.*, 587-591; Oppenheim, *International Law*, ed. Lauterpacht, 5th ed. (1935), vol. II, 234, note 2. *The Hypatia* [1917] P. 36, 39, 40, *per* Sir Samuel Evans, P. The character is "equally applicable to persons not engaged in trade." Cited from Dicey, *Conflict of Laws*, 2nd ed., p. 741, by Scrutton, L.J., in *Tingley v. Müller* [1917] 2 Ch. 144, 173.

<sup>2</sup> *The Daimler Case* [1916] 2 A.C. 307, 339.

<sup>3</sup> Cheshire, 205, citing Lord Parker in *The Anglo-Mexican* [1918] A.C. 422, 425. But see Dicey, *Conflict of Laws*, 5th ed. (1932), 121, note (e). See also the citation at [1918] A.C. 426, from Mr. Justice Story's Notes (*Pratt's Story*, at pp. 60-61).

<sup>4</sup> *Ib.*, the term used by Scrutton, L.J., in *Tingley v. Müller* [1917] 2 Ch. 144, 173.

<sup>5</sup> *The Harmony* (1800), 2 C. Rob. 322, 324, 325.

<sup>6</sup> *The Anglo-Mexican* [1918] A.C. 422, 425, *per* Lord Parker; but see *The Hypatia* [1917] P. 36: cf. the Trading with the Enemy Act, 1939, s. 1 (1) (e), *supra*.

An alien enemy may not acquire a neutral domicile to protect his trade, if he emigrates into the neutral country from his own, *flagrante bello*.

"A neutral who resides or trades in a belligerent country will preserve his

transactions in those countries, as a subject of both. "That he has no fixed counting-house in the enemy's country will not be decisive."<sup>1</sup>

Fourthly, "the character that is gained by residence, ceases by residence . . . from the moment he puts himself in motion, *bona fide*, to quit the country . . ."<sup>2</sup>

"Civil domicile is such a permanent residence in a country as makes that country a person's home. Commercial domicile is such a residence in a country for the purposes of trade or otherwise as makes a person's trade or estate form part of its resources. To gain a civil domicile residence is required with an intention of making the country one's home. To gain a commercial domicile, residence with no intention of leaving shortly is sufficient, and time is the principal ingredient in the domicile."<sup>3</sup>

## II. JUDICIAL DEFINITIONS

### 1. *The Janson Case*

"But when considering questions arising with an alien enemy," observed Lord Lindley in *Janson v. Driefontein Consolidated Gold Mines*,<sup>4</sup> "it is not the nationality of a person, but his place of business during war, that is important."

"An Englishman carrying on business in an enemy's country is treated as an alien enemy in considering the validity or invalidity of his commercial contracts (*McConnell*

neutral character if he leave the country with his property *sine animo revertendi*. If on the outbreak of hostilities he promptly take steps to leave, he will not be considered an enemy, even when still in the belligerent State, provided that he carries on his preparations without delay. But a mere intention to leave, not accompanied by any overt act, is not sufficient" (1 Arnould, *Marine Insurance* 9th ed. (1939), chap. V, s. 95, note (z), citing, among other cases, *The Anglo-Mexican* [1918] A.C. 422, 425). And see *per* Lord Porter in *The Sovfracht Case* [1943], A.C. 203, 237: "No doubt, both in prize and at common law, a person who is engaged in business in a country which becomes hostile, but is not resident there, is given a reasonable time to dissociate himself from that business if he wishes to avoid becoming an alien enemy, and even if he resides in such a country it may be that he will escape the imputation of hostility by removing himself from it as quickly as is reasonably possible (see *The Anglo-Mexican*) . . ."

<sup>1</sup> *The Jonge Klassina* (1804), 5 C. Rob. 296, 302, *per* Sir W. Scott.

<sup>2</sup> *The Indian Chief* (1800), 3 C. Rob. 12, 19, 20, 21, *per* Sir W. Scott.

Contrast *In the Goods of Ruffenel* (1803), 32 L.J.P. & M. 203, for the rule that civil domicile can only be abandoned by abandonment in fact.

<sup>3</sup> *Tingley v. Müller* [1917] 2 Ch. 144, 173, *per* Scrutton, L.J. See Malcolm M. Lewis, *Domicile as a Test of Enemy Character*, B.Y.I.L., 1923-1924, 60-77. See also Farnsworth, 47-52 and 125-147. "Commercial domicile" depends upon residence; "real" domicile (where this is chosen) depends upon a combination of residence and the intention of permanent or indefinite residence (Dicey, *Conflict of Laws* (1932), 5th ed., r. 7).

<sup>4</sup> [1902] A.C. 484, 505, 506.

v. *Hector*).<sup>1</sup> Again, the subject of a State at war with this country, but who is carrying on business here or in a foreign neutral country, is not treated as an alien enemy; the validity of his contracts does not depend on his nationality, nor even on what is his real domicile, but on the place or places at which he carries on his business or businesses (*Wells v. Williams*).<sup>2</sup>

The principle applies equally to residence.

## 2. *Porter v. Freudenberg*

A complete account of the history and the status of an alien enemy was given by Lord Reading, C.J., delivering the judgment of the full and specially constituted Court of Appeal, in *Porter v. Freudenberg*<sup>3</sup> :—

“When considering the enforcement of civil rights a person may be treated as the subject of an enemy State, notwithstanding that he is in fact a subject of the British Crown or a neutral State. Conversely, a person may be treated as a subject of the Crown notwithstanding that he is in fact the subject of an enemy State . . .”

The learned Lord Chief Justice, citing Lord Lindley's statement in *The Janson Case*, *supra*, said that it “was not intended to be, and is not, exhaustive.” Lord Lindley was considering the character of a trading corporation; he was not dealing with a person residing in enemy territory. “Such a person,” Lord Reading continued, “is equally treated as an alien enemy provided he is voluntarily resident there, having elected to live under the protection of the enemy State.” Then follows the well-known definition :—

“For the purpose of determining civil rights, a British subject or the subject of a neutral State,<sup>4</sup> who is voluntarily

<sup>1</sup> (1802) 3 Bos. & P. 113, 114, *per* Lord Almonley, Ch. J. “I do not wish to hear it argued that a person who lives and carries on trade under the protection and for the benefit of an hostile State, and who is so far a merchant settled in that State that his goods would be liable to confiscation in a court of prize, is yet to be considered to sue as an English subject in an English court of justice. The question is, whether a man, who resides under the allegiance and protection of an hostile State for all commercial purposes, is not to be considered for all civil purposes as much an alien enemy as if he were born there?” Approved in *Rodriguez v. Speyer* [1919] A.C. 59, 73, 97, *per* Lord Finlay, L.C., and Lord Atkinson (of the minority); and in *The Soufracht Case* [1943] A.C. 203, 209, 236, 239, *per* Viscount Simon, L.C., and Lord Porter.

<sup>2</sup> (1697), 1 Salk. 46 : 1 Ld. Raym. 282, 283 : “An alien enemy who is here in protection may sue his bond or contract,” *per* Treby, Chief Justice. See Lord Porter's speech in *The Soufracht Case* [1943] A.C., at 240.

<sup>3</sup> [1915] 1 K.B. 857, 868, 869. Sir John Simon, Attorney-General, appeared upon the invitation of the court, as *amicus curiæ*. His argument is at 863-866.

<sup>4</sup> For example, a neutral, consul of a neutral State, residing and trading in an enemy country : *Albrecht v. Sussman* (1813), 2 V. & B. 323, 328, *per* Eldon, L.C. See *The Baltica* (1857), 11 Moo. P.C. 141.

resident<sup>1</sup> or who is carrying on business in hostile territory, is to be regarded and treated as an alien enemy and is in the same position as a subject of hostile nationality resident in enemy territory."

### 3. *The Sovfracht Case*

The House of Lords, examining, during the present war, the meaning of "enemy character," have approved the reasoning in *Porter v. Freudenberg*.

Viscount Simon, L.C., said :—

"An alien enemy, in this connection, does not mean a subject of a State at war with this country, but a person, of whatever nationality, who is carrying on business in, or is voluntarily resident in, the enemy's country: *Porter v. Freudenberg*."<sup>2</sup>

Summarising his conclusions, as deduced from the authorities, the Lord Chancellor declared :—

"1. The test of 'enemy character' is fundamentally the same whether the question arises over a claim to sue in our courts, or over issues raised in a court of prize, or over a charge of trading with the enemy at common law.

2. The test is an objective test, turning on the relation of the enemy Power to the territory where the individual voluntarily resides or the company is commercially domiciled or controlled. It is not a question of nationality or of patriotic sentiment."<sup>3</sup>

And Lord Wright similarly observes :—

"... the test which has been taken of enemy character in English law is not nationality, but domicile in the sense of settled residence or, in the case of traders, commercial domicile.<sup>4</sup> Domicile in the strict legal sense is not necessarily relevant<sup>5</sup> ... the right to sue or prosecute an action in

<sup>1</sup> [1915] 1 K.B., at 869. Lord Reading quotes the following passage from Dicey, *Parties to an Action*, 3: "Under the term 'alien enemy' are included not only the subjects of any State at war with us, but also any British subjects or the subjects of any neutral State voluntarily residing in a hostile country." See *Scotland v. South African Territories, Ltd.* (1917), 33 T.L.R. 255. S had been voluntarily residing in German South-West Africa as the employee of an English firm, and on the outbreak of the war was interned, though not in complete captivity. Darling, J., held that he was not entitled to sue for salary for the period of internment. See *Roberts v. Hardy* (1815), 3 M. & S. 533, 536. "He was detained as a prisoner," said Park, J., explaining the latter case in *Willison v. Patteson* (1817), 7 Taunt. 439, 448.

<sup>2</sup> *Sovfracht (V/O) v. Van Udens Scheepvaart en Agentuur Maatschappij (N.V. Gebr.)* [1943] A.C. 203, 209. See definition in (1945) Cmd. 6591, para 8.

<sup>3</sup> *Id.*, 211.

<sup>4</sup> It is submitted with respect that the term "commercial domicile" applies to a resident as well as to a trader.

<sup>5</sup> The word "necessarily" seems, with respect, to be redundant.

court, the right to claim to be exempt from seizure and condemnation in prize, the liability to punishment for the offence of trading with the enemy, all depend alike on whether the person has enemy character in what has been called the technical or territorial sense.<sup>1</sup> The test is objective and depends on facts, not on the person's prejudices or passions, his patriotism, or his determination to free his country whenever he can."<sup>2</sup>

Thus, also, Lord Porter :—

" . . . the principle that even a British subject voluntarily resident or carrying on business in the territory of a hostile Power is to be treated as an alien enemy has generally been accepted since the decision in *Porter v. Freudenberg* in the Court of Appeal."<sup>3</sup>

" When one sovereign had declared war on another, every subject of the one was the enemy of every subject of the other. This outlook was gradually modified: first, by lessening the stringency in favour of enemy subjects residing here and subjecting themselves to the protection of the Crown<sup>4</sup>; and later, by an increase in stringency towards nationals of friendly or neutral countries voluntarily residing in or carrying on business in hostile territory."<sup>5</sup>

### III. TERRITORY UNDER ENEMY OCCUPATION

#### 1. *Principles ; Sovfracht Case*

" Enemy territory " is defined in the Trading with the Enemy Act, 1939, for the purpose of that Act, as—

" any area which is under the sovereignty of, or in the occupation of, a Power with whom His Majesty is at war, not being an area in the occupation of His Majesty or of a Power allied with His Majesty."<sup>6</sup>

<sup>1</sup> Territorial, but with respect, not technical.

<sup>2</sup> *Ib.*, 219. For the development of the modern conception of enemy character from the case of *Wells v. Williams* (1697), 1 Ld. Raym. 282, where a French Protestant, who had come to England before the war with France, was allowed to sue: see Holdsworth, *History of English Law*, vol. IX, 99-104; see also *per* Story, J., in *The Society for the Propagation of the Gospel v. Wheeler* (1814), 2 Gallinson, 105, 130, 131, 132.

<sup>3</sup> [1943] A.C., at 239. " By enemy in the territorial sense is meant a person of any or no nationality who is voluntarily resident or carrying on business in enemy or enemy-occupied territory ": McNair, 84.

See Robert M. W. Kempner, *The Enemy Problem in the Present War*, A.J.I.L., vol. 34 (1940), 443-458.

<sup>4</sup> Citing *Wells v. Williams*, *supra*.

<sup>5</sup> [1943] A.C., at 238, citing *Porter v. Freudenberg* [1915] 1 K.B. 857, 867.

<sup>6</sup> Section 15 (1). See on evidence, s. 15 (2). The following countries have been officially recognised, since the specified dates, as being " enemy territory ": Germany (including Austria and Memel), Danzig, Bohemia, Moravia, Slovakia

The "occupation" of territory increases the capacity of the enemy for prolonging the war; such territory, while so occupied, must be considered as belonging to the enemy.<sup>1</sup>

What is meant, for this purpose, by "occupation"?

The subject has been exhaustively examined by the House of Lords in *The Sovfracht Case*,<sup>2</sup> one of the leading cases of the present war.

(3rd September, 1939); Poland (1st January, 1940); Denmark (excluding Greenland and Faroe Islands) (12th April, 1940); Norway (20th May, 1940); Norwegian Provinces of Nordland, Troms and Finmark (10th July 1940); The Netherlands, Luxembourg (20th May, 1940); Belgium (31st May, 1940); Italy (including Albania and Italian colonies and possessions) (11th June, 1940); Italy (excluding Italy reoccupied by the United Nations), Channel Islands (1st July, 1940); France (occupied-zone) (17th June, 1940); Crete (1st June, 1941); Japan, Japanese-occupied China (including Manchuria), French Indo-China (8th December, 1941); Siam (12th December, 1942); Hong Kong (25th December, 1941); Straits Settlements (15th February, 1942); Netherlands East Indies (7th March, 1942); Andaman and Nicobar Islands (23rd March, 1942); France (unoccupied zone) (11th November, 1942).

The Board of Trade, by orders made under s. 15 (1a), applied the Act to the following countries: France (unoccupied zone) (10th July, 1940); Monaco (13th July, 1940); French Somaliland (4th September, 1940); Roumania (15th February, 1941); Bulgaria (5th March, 1941); Hungary (8th April, 1941); Yugoslavia (18th April, 1941); The Mainland of Greece (30th April, 1941); Finland (2nd August, 1941). See Postscript, *infra*, 228.

By the Trading with the Enemy (Enemy Territory) (Cessation) Order, 1943 (S.R. & O., 1943, No. 1684), made under reg. 6 of the Defence (Trading with the Enemy) Regulations, 1940 (as amended), the Board of Trade directed that for the purposes of the Trading with the Enemy Act, 1939, ss. 3A, 4, 5 and 7, the following should cease to be treated as enemy territory:—

Corsica; Syria and the Lebanon; French Somaliland; Algeria; the French Zone of Morocco and Tunisia.

Under reg. 6 of *The Defence (Trading with the Enemy) Regulations*, 1940, areas *ceasing to be enemy territory* and occupied by His Majesty or Allied Powers remain enemy territory for the purposes of *certain sections* of the Trading with the Enemy Act, 1939. Regulation 7 (S.R. & O., 1944, No. 1123, 28th September, 1944) applies *the whole Act and the orders* to territories which, on 28th September, 1944, are under enemy sovereignty. See (md. 6591 (1945), para. 17.

By the Trading with the Enemy (Authorisation) Order, 1943 (S.R. & O., 1943, No. 822), any person, unless the Board of Trade otherwise directs, may trade within the following territories:—

Algeria, Tunisia, The French Zone of Morocco, The Federation of French West Africa, French Equatorial Africa, The Cameroon under French Mandate, French Somaliland, Madagascar and its dependencies, Reunion, Saint Pierre and Miquelon, The French Establishments in India, New Caledonia, The French Establishments in Oceania, The Condominium of the New Hebrides, Syria and the Lebanon, French Guiana, Martinique and Guadeloupe.

<sup>1</sup> "Enemy territory" is defined in the United States Trading with the Enemy Act, 1917, s. 2 (a), as "that occupied by the military and naval forces of any nation with which the United States is at war." This definition is superseded by General Ruling No. 11, declaring enemy territory to include "the territory controlled or occupied by the military, naval or police forces or other authority of Germany, Italy or Japan" (Domke, 186). See Domke, chap. 14, *Occupied Territory*.

<sup>2</sup> [1943] A.C. 203. See also Lewis, *op. cit.*, 74, 75; 2 Pitt Cobbett, 43-45.

These statutory definitions "substantially agree" with the definitions reached by the common law.<sup>1</sup>

A ship-owning company incorporated in Holland, with its principal place of business at Rotterdam, had chartered one of its vessels, in August, 1939, to the appellants, a Russian company. Disputes arose, and in April, 1940, each party appointed an arbitrator. By the second week in May, Holland was invaded and occupied by the enemy, and remained under enemy control. The Royal Netherlands Government retired to England.<sup>2</sup> On 20th May the shipowners' solicitors applied to the Custodian of Enemy Property for his approval to proceed with the arbitration, any sums recovered to be accounted for to him under the Trading with the Enemy Regulations.<sup>3</sup> The Custodian raised no objection—"so far as the Trading with the Enemy legislation is concerned." While the case was before the Court of Appeal, an application was made to the Trading with the Enemy Branch (Treasury and Board of Trade), who in October, 1941, under the Trading with the Enemy Act, 1939, s. 1 (2) (i), gave an authority to the solicitors acting for the shipowners—retrospective to May, 1940—to continue to act on their behalf. The authority stated that it was for the court in the arbitration to decide whether the owners, being in enemy occupied territory, were entitled to proceed. This authority dealt only with the matter of trading with the enemy, not with the ability to proceed in court—for which a royal licence is required. In any event it could not be retrospective, said Lord Wright, so as to legalise acts which, when they were done, were unlawful.

After the occupation, the charterers' arbitrator and their solicitors had refused to proceed, or to appoint an umpire; when the company became an alien enemy, the retainer of its solicitors was terminated. On application in the shipowners' name, the master made an order appointing an umpire; this order Asquith, J., affirmed. The Court of Appeal held that at common law the Dutch company was not an alien enemy, and therefore could proceed. The company was, however, an enemy corporation within s. 2 (1) and s. 15 (1) of the Trading with the Enemy Act, 1939, and reg. 3 of the Defence (Trading with the Enemy Regulations), 1940<sup>3</sup>; the solicitors, therefore, could not act without a licence. Although that court held that the authority could not be retrospective, yet, on the concession of counsel for the company, the proceedings were treated as taking place before October, 1941.<sup>4</sup> Lord Wright doubted the

<sup>1</sup> [1943] A.C., at 219, *per* Lord Wright. See Cmd. 6591, para. 8.

<sup>2</sup> See *In re Amand* [1941] 2 K.B., 239, 250, *per* Viscount Caldecote, C.J.

<sup>3</sup> S.R. & O., 1940, No. 1092.

<sup>4</sup> *In re an Arbitration, N.V. Gebr. Van Udens Scheepvaart en Agentuur Maatschappij v. Sonfracht* [1942] 1 K.B. 222, 231, *per* Lord Greene, M.R.



propriety of this procedure—the consensual waiver of a breach of the criminal law “so as to render lawful what was illegal.””

Viscount Simon, L.C., summarising the authorities, declared :—

“If, as a result of the occupation, the enemy is provisionally in effective control of an area at the material time, and is exercising some kind of government or administration over it, the area acquires ‘enemy character.’ Local residents cannot sue in our courts, and goods shipped from such an area have enemy origin . . . If, on the other hand, the occupation is of a slighter character—for instance, if it is incidental to military operations, and does not result in effective control, the case is different . . .”<sup>2</sup>

Lord Wright, examining the Anglo-American authorities, pointed out that “enemy-subjugated territory” was a more appropriate description.<sup>3</sup> A “mere temporary occupation, for instance, by a military force in the conduct of belligerent operations, is not enough. If the territory is to be deemed enemy territory, it must be subjugated, not merely occupied. It must be held under the dominion and control of the enemy for a period sufficient to give the occupation a settled and relatively permanent character and to show the intention to keep it.” Formal acts, such as cession by treaty or a declaration of annexation, are not necessary. It is a question of fact, having regard to “the character, purpose and intention of the occupation and the degree of dominion exercised.”<sup>4</sup> During war, territory may change hands and re-change; the test remains: is there, or is there not, “effective control”? Does there exist “firm possession for a sufficient period with the intention of keeping it unless it is reconquered or surrendered . . . ?”<sup>5</sup>

Of the status of the Netherlands no evidence was given: it was accepted as a “matter of common notoriety” that Holland was under the dominion of the Germans. Hence, the Dutch, so far as they were in Holland, were in law *vis-a-vis* Great Britain, alien enemies.

“They cannot sue or appear as actors in the English courts. They cannot trade with England; their property in England is subject to the Trading with the Enemy Act and regulations. They are shut off from intercourse with Britain. The reason is that while the occupation lasts, they are on the wrong side of the line of hostile demarcation, the line of war which shuts off those on that side of the line from

<sup>1</sup> [1943] A.C., at 218. The facts are stated at 203–205.

<sup>2</sup> *Ib.*, 211.

<sup>3</sup> *Ib.*, 219. But see McNair, 328.

<sup>4</sup> *Ib.*, at 219, 220.

<sup>5</sup> *Ib.*, at 220.

communication and intercourse and commercial dealing with those on our side in substantially the same way as if they were originally enemies as nationals of, or resident in, the enemy state."<sup>1</sup>

As soon as the Dutch company became in law an alien enemy, the retainer of its solicitors became abrogated.<sup>2</sup> When the principal becomes an alien enemy, the authority of the agent ceases, for the relationship of principal and agent necessitates intercourse which is not permissible.

In practice the harshness may be mitigated, for the Crown in its absolute discretion may grant a royal licence to an alien enemy, which may *pro tanto* relieve him of disabilities or entitle him to pursue his claim.<sup>3</sup>

The *Sovfracht Case* was distinguished by Bucknill, J., in *The Pamia*.<sup>4</sup> An Italian company who owned the *Pamia* admitted liability in November, 1939, in an action brought upon a collision by a Belgian company who carried on business in Antwerp. In February, 1940, the Belgian Government, then neutral, had made an Order in Council enabling Belgian commercial companies "by a simple decision of the administrative organ of the company or its directors, the manager or the management committee" to transfer provisionally their head offices to a foreign country. On 20th June, 1940, the company owning the *Lubrafol* passed a resolution at Pittsburg, Pennsylvania, extending the mandates of the directors until an extraordinary general meeting of the company could be held, and resolving that the "legal domicile" of the company—i.e., the residence or "commercial domicile"—be transferred from Belgium to Pittsburg. Bucknill, J., dismissed a motion to stay further proceedings.

## 2. Lord Stowell's Views

The reasoning in the *Sovfracht Case*,<sup>5</sup> especially in the speech of Lord Wright, is based upon the views of Lord Stowell (then Sir William Scott, in *The Hoop*,<sup>6</sup> formed after an elaborate survey of earlier cases in prize. That classical judgment deserves careful perusal; it contains the basic exposition of the law against trading with the enemy, of the absolute power

<sup>1</sup> [1943] A.C., at 229, 230.

<sup>2</sup> *Ib.*, at 236 and at 254, *per* Lord Porter; McNair, 313.

<sup>3</sup> *Ib.*, at 230, *per* Lord Wright. See Cmd. 6591, para. 11.

<sup>4</sup> *The Pamia* (1943), 112 L.J. (P.) 34. See Note (1944), 60. L.Q.R. 16-18. "A.F." points out that "domicil" is here used in the sense of *siege social effectif*, i.e., the "centre of a company's affairs or administrative business."

See also Domke, chap. 13, *Transfer of Business Places of Corporations*, 172-180, for similar legislation of the Dutch Government.

<sup>5</sup> See McNair, 322, 328.

<sup>6</sup> (1799), 1 C. Rob. 196, 198 *et seq.*

of the sovereign to permit intercourse with the enemy, and of the enemy's disability to sue.

British merchants in Glasgow, before hostilities, had extensively traded with, and imported goods from, Holland. After the French irruption into Holland, they obtained special Orders in Council permitting them to continue that trade. Upon advice by the Commissioners of Customs of Glasgow that no licence was necessary, they shipped goods at Rotterdam, documented for Bergen, in order to avoid the enemy's cruisers. The goods were captured and condemned in prize :—

"A trading with the enemy, except under royal licence, subjects the property to confiscation."<sup>1</sup>

Among the many cases mentioned by Sir W. Scott, reference may be made to *The Bella Guidita*.<sup>2</sup> British merchants chartered a ship to carry a cargo from Ireland to the British plantations in Grenada which the French had recently captured, and to bring back a cargo of produce. The cargo was condemned as French property. The proprietors, it was said, were "still British in principle and affection"; the island, they hoped, would soon revert to "their national sovereign."<sup>3</sup>

This decision and similar decisions equate with enemy territory, territory in the effective occupation of the enemy.

Lord Stowell's opinion is shown in several subsequent decisions. Thus in *The Bolletta*,<sup>4</sup> a Danish ship, bound from Zante to Copenhagen, the property of merchants in the Seven Islands, was captured. It was argued that before the capture the islands had been ceded to France by Russia. The Crown contended that the possession taken by the French was "of a forcible and temporary nature." The cession was held to have been "a voluntary surrender" in time of peace, "not an hostile occupation by force of arms liable to be lost again the next day."

In *The Fama*,<sup>5</sup> the question was whether Louisiana, in May, 1803, was a Spanish settlement, or, under a treaty of 1796, belonged to France. Possession had not yet been taken, nor had French jurisdiction been exercised. At the time of capture, the colony was under the dominion of Spain, then neutral; the Spanish owners were entitled to their goods.

In *The Foltina*,<sup>6</sup> a ship and cargo had been seized in 1811, lying at anchor in the roadstead of Heligoland which in 1807

<sup>1</sup> (1799), 1 C. Rob., at 202.

<sup>2</sup> (1785), Lords of Appeal, *ib.*, at 207.

<sup>3</sup> A statute had been passed to protect *exports* from Grenada from confiscation; it was unsuccessfully contended that this involved permission to import.

<sup>4</sup> (1809), Edwards, 171, 174.

<sup>5</sup> (1804), 5 C. Rob. 106, 119, 120.

<sup>6</sup> (1814), 1 Dodson 450.

had surrendered to British forces. The conquest had not yet been confirmed by treaty of peace. "It was a firm capture in war, but was still subject to a kind of latent title in the enemy, by which he might have recovered it at the conclusion of the war, provided this country would have consented to its restitution."<sup>1</sup> But "a conquered country forms immediately part of the King's dominions": "The power of the *British* Government was full and complete."<sup>2</sup>

From these cases, it is clear, said Lord Wright, that in Lord Stowell's opinion

"a territory changed its national character and acquired that of the conqueror if there were effective subjugation and firm possession with the intention of keeping the conquest, even though in the event the dominion of the conqueror was temporary, and even though there was not either formal annexation or cession. What had to be considered was the nature of the occupation. A mere occupation in the course of and for purposes of military operations did not change the national character."<sup>3</sup>

### 3. *American Judicial Opinion*

Upon the meaning of "enemy-occupied territory" Lord Wright refers to certain decisions of the Supreme Court of the United States arising out of the war between England and the United States from 1812 to 1815.<sup>4</sup>

In *Thirty Hogsheads of Sugar (Bentzon v. Boyle)*,<sup>5</sup> sugar, the property of a Dane from his plantation in *Santa Cruz*, had been shipped after the capture of that island by the British to a house in London at the risk of the claimant, a Danish officer who had been in the government of the island before its capture, but had since resided in Denmark. The inhabitants were permitted to keep their property, but could ship its produce to Great Britain only. In July, 1812, after the United States had declared war on Great Britain, the sugar was captured by an American privateer and was brought into Baltimore.

B, it was argued, "never incorporated himself with the interests of the British nation, *either permanently or temporarily*. The character was *forced* upon him against his will." The occupation of the island was temporary: upon peace, it was restored to Denmark. Here was an ordinary case of a neutral carrying on his lawful trade with the enemy. For the captors it was said that the island, immediately on capture, became the

<sup>1</sup> (1814), 1 Dodson 450.

<sup>2</sup> *Ib.*, 452.

<sup>3</sup> [1943] A.C. 203, at 222.

<sup>4</sup> *Ib.*, 223, 234.

<sup>5</sup> (1815), 9 Cranch 191.

colony of an enemy. The occupation, even though not perpetual, was indefinite. A party need not "incorporate himself with the interests of the enemy": if he continues to hold the estate, he becomes *jure belli* "incorporated with the nation."

Marshall, C.J., declared:—

"Although acquisitions made during war are not considered as permanent until confirmed by treaty, yet to every commercial and belligerent purpose, they are considered as a part of the domain of the conqueror, so long as he retains the possession and government of them. The island of Santa Cruz, after its capitulation, remained a British island until it was restored to Denmark."<sup>1</sup>

The case was governed by *The Phœnix*,<sup>2</sup> where a vessel had been captured in a voyage from Surinam to Holland, and its cargo, claimed by residents in Germany (then neutral), as the produce of their estates, was condemned by Sir W. Scott as being impressed with "the character of the country." The Chief Justice cites from Sir W. Scott in *The Vrow Anna Catharina*<sup>3</sup>: "The produce of a person's own plantation in the colony of the enemy, though shipped in time of peace, is liable to be considered as the property of the enemy, by reason that the proprietor has incorporated himself with the permanent interests of the nation, as a holder of the soil, and is to be taken as part of that country, in that particular transaction, independent of his own personal residence and occupation." When Santa Cruz became British, the soil and its produce were British. This transaction was unaffected by the "general commercial or political character" of the owner: and "though as a Dane, he was at war with Great Britain, and an enemy, yet, as a proprietor of land in Santa Cruz, he was no enemy: he could ship his produce to Great Britain in perfect safety."<sup>4</sup> Rules established in British courts have a special claim to American attention.<sup>5</sup>

In *United States v. Hayward*,<sup>6</sup> Story, J., considered the status of Castine (in Maine) during the British occupation. "By the conquest and occupation of *Castine*," he said, that territory passed under the allegiance and sovereignty of the enemy. The sovereignty of the *United States* over the territory was, of course, suspended, and the laws of the *United States* could no

<sup>1</sup> (1815), 9 Cranch, at 195.

<sup>2</sup> (1803), 5 C. Rob. 20, 21.

<sup>3</sup> (1804), 5 C. Rob. 161, 167.

<sup>4</sup> (1815), 9 Cranch, 191, at 197.

<sup>5</sup> "The United States having, at one time, formed a component part of the British Empire, their prize law was our prize law. When we separated, it continued to be our prize law, so far as it was adapted to our circumstances, and was not varied by the power which was capable of changing it." *Ib.*, at 198.

<sup>6</sup> (1815), 2 Gallinson, 485, 493-515.

longer he rightfully enforced, or be obligatory upon the inhabitants, who remained and submitted to the conquerors."<sup>1</sup> The allegiance was temporary; nor did the possession give ownership. Only by renunciation in a treaty, or by long and permanent possession showing abandonment by its sovereign, or "irretrievable" subjugation, could it be considered as "incorporated" into the British dominions. Until such incorporation by recapture or repossession, the territory would have the *jus postliminii*. For the purpose of the non-importation laws, Castine was no longer a port of the United States *vis-a-vis* the obligation of its laws, but was a "foreign" port.<sup>2</sup>

Thus, also, in *United States v. Rice*.<sup>3</sup> Were goods imported into Castine during the British occupation liable to the duties upon goods imported into the United States? The British Government exercised all civil and military authority; they established a customs-house and admitted the goods upon which duties were now demanded. Upon the re-establishment of the American Government, the collector of the customs, as security for the revenue duties, took a penal bond. The claim could not be sustained, said Story, J.

"By the conquest and military occupation of Castine, the enemy acquired that firm possession which enabled him to exercise the fullest rights of sovereignty over that place."<sup>4</sup>

The sovereignty of the United States over Castine was suspended: their laws could no longer be enforced in the island, nor were they obligatory upon the inhabitants. Upon surrender, the inhabitants "passed under a temporary allegiance to the British Government" and were bound by such laws as it chose to impose. No other laws could be obligatory: "where there is no protection or allegiance or sovereignty, there can be no claim to obedience."<sup>4</sup> Castine, *qua* the revenue laws, was a foreign

<sup>1</sup> (1815), 2 Gallinson, at 501.

<sup>2</sup> *Ib.*, at 502.

<sup>3</sup> (1819), 4 Wheaton 246.

<sup>4</sup> *Ib.*, at 254. See McNair, 337-339, and (on *postliminium*) Hall, 8th ed., 579 and Oppenheim, vol. II, s. 282. *Postliminium* is the restoration of the legal state of things as it existed before the hostile occupation; "it does not, except in a very few cases, wipe out the effects of acts done by an invader, which for one reason or another it is within his competence to do. Thus, judicial acts done under his control, when they are not of a political complexion, administrative acts so done, to the extent that they take effect during the continuance of his control, and the various acts done during the same time by private persons under the sanction of municipal law, remains good" (Hall, *loc. cit.*).

See also McNair's citation, 344, upon *The American Civil War Cases*, in which the Supreme Court upheld all laws made and acts done by the Confederate Government that were "necessary to the peace and good order of the realm, such as sanctioning and protecting marriage, determining laws of descent, regulating the transfer of property and providing legal redress for injuries"—unless "public policy and justice required otherwise." See also 350-352. The passage is based

port; goods imported were subject only to such duties as the British Government imposed: "in no correct sense" were they imported into the *United States*. Nor was the character of these transactions changed by the evacuation of the island and the resumption of authority by the *United States*.

*The Brig Amy Warwick*<sup>1</sup> arose out of the American Civil War. A merchant vessel belonging to Richmond, Virginia, was on her voyage from Rio to Hampton Roads when she was captured by a police ship of the *United States* and condemned in the Prize Court. The majority of the Supreme Court held that all persons residing within Confederate territory were liable to be treated as enemies, though not foreigners.<sup>2</sup> Upon civil war, hostilities might be prosecuted as if those opposing the Government were foreign invaders.<sup>3</sup>

#### 4. *The Gerasimo*

*The Gerasimo*,<sup>4</sup> decided by the Privy Council, arose out of the Crimean War.

The ship, with corn taken on board at Galatz, was bound upon capture to Trieste. She had been sailing under Wallachian colours, and in 1854, as she was emerging from the Danube, was captured for a breach of the blockade. She was sent to Constantinople, where she was released upon security and the cargo was sold. Dr. Lushington (Judge of the Admiralty Court) held that the claimants, resident in Galatz at the time of the shipment, were to be treated as alien enemies. Galatz, in Moldavia, was in the possession of Russia: "so long as any territory is in possession of the enemy . . . all the inhabitants thereof, and all the persons resident therein and carrying on trade, are to be considered as enemies with respect to that trade."<sup>5</sup> This statement, Lord Wright observes in *The Sovfracht Case*, was too wide: "It is necessary to define the character of the possession."<sup>6</sup>

The Privy Council reversed the decision.

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upon the opinion of the Supreme Court (delivered by Chase, C.J.), in *Texas v. White* (1868), 7 Wall. 700, 733.

And see L. H. Woolsey, *The Forced Transfer of Property in Enemy Occupied Territories*, A.J.I.L., vol. 37 (1943), 282-286. The *United States*, the nations of the British Commonwealth, Russia, China and certain captive countries have reserved their rights to declare invalid any such transfer, if the property was situate in enemy occupied territory, or belonged to any person resident in such territory. Under the Hague Regulations (1890, revised 1907), private property cannot be confiscated and pillage is forbidden.

<sup>1</sup> (1862), 2 Black 635.

<sup>2</sup> *Ib.*, 674.

<sup>3</sup> *Ib.*, 667, 668.

<sup>4</sup> *Oremidi v. Powell* (1857), 11 Moo. P.C. 88.

<sup>5</sup> *Ib.*, 96.

<sup>6</sup> [1943] A.C. 203, at 224.

They held that the national character of the country was not changed and that the occupation was provisional. Lord Kingsdown (then Rt. Hon. T. Pemberton Leigh), however, made certain observations which the House of Lords in *The Sovfracht Case*<sup>1</sup> disapproved. After stating that the "national character of a trader" depends, for the purposes of the trade, upon the national character of the place where he is trading; that if, upon the outbreak of war, he is in a belligerent country, he has a reasonable time within which to transfer himself and his property to another country, Lord Kingsdown asks:—

"... what are the circumstances necessary to convert friendly or neutral territory into enemy's territory? For this purpose, is it sufficient that the territory in question should be occupied by a hostile force, and subjected, during its occupation, to the control of the hostile Power, so far as such Power may think fit to exercise control; or is it necessary that either by cession or conquest, or some other means, it should, either permanently or temporarily, be incorporated with, and form part of, the dominions of the invader at the time when the question of national character arises?"<sup>2</sup>

The first proposition, Lord Kingsdown said, could not be maintained. "The national character of a place" is not changed by the mere possession and control of a hostile force. He quoted *The Manilla*<sup>3</sup> upon the position of certain parts of St. Domingo, which after the negro insurrection, even though they were not in possession of the French, were still considered French. *The Santa Anna*<sup>4</sup> was also quoted. There, a Spanish ship captured on a voyage to Cadiz, an allied port, even though the French were then dominant in Spain, was restored to the owner. An Order in Council of 1808 had declared that all hostilities against Spain should immediately cease, and that all Spanish ships should have free admission into British ports and should be treated as the ships of States in amity with His Majesty. (These two cases, said Lord Wright, were heard on their special facts.<sup>5</sup>)

Lord Kingsdown also cited *Donaldson v. Thompson*,<sup>6</sup> from the Courts of Common Law, concerning the condition of Corfu, where for several years there had been a Russian garrison; nevertheless, the flag of the Ionian Republic, a neutral, flew from the forts. An American ship, bound for Smyrna, had

<sup>1</sup> [1943] A.C. 203, at 211, 212, *per* Viscount Simon, L.C.; at 213, 214, *per* Lord Atkin; at 225, 226, *per* Lord Wright; at 244, 245, *per* Lord Porter.

<sup>2</sup> (1857), 11 Moo. P.C., 88, at 96.

<sup>3</sup> (1808), 1 Edwards 3, *per* Lord Stowell.

<sup>4</sup> (1809), 1 Edwards 180, 181, 182.

<sup>5</sup> [1943] A.C. 203, at 225.

<sup>6</sup> (1808), 1 Campb. 429, 431.



been captured by a Russian privateer, was carried into Corfu and there condemned. On a motion to set aside the verdict, Lord Ellenborough observed that the Ionian Republic was not superseded; Corfu was neither Russian, nor "co-belligerent" with Russia.<sup>1</sup> Thus, also, in *Hagedorn v. Bell*,<sup>2</sup> although for several years Hamburg had been in possession of French troops, yet the local senate had continued to exercise its powers, and Orders in Council had permitted a continuance of commerce with persons resident there. The assured in England was held entitled to recover upon an insurance policy for a loss that occurred in 1810 in the course of a voyage from England to Hamburg, which, by licence, had been permitted to any port of the Baltic not under blockade. Until 1811, when the senate was deposed by the French Emperor, Hamburg claimed to be a sovereign State, but in 1806 French troops had occupied the town, the senate retaining its sovereign civil authority. Orders in Council legitimated trade with Hamburg; despite her conduct, she was considered as friendly. In *The Bolletta*,<sup>3</sup> where Zante was held to have become French territory by cession, Lord Stowell distinguished between hostile occupation and possession clothed with a legal right by cession or conquest or confirmed by length of time.

These authorities, concluded Lord Kingsdown, showed that "the mere possession of a territory by an enemy's force does not of itself convert the territory so occupied into hostile territory, or its inhabitants into enemies."<sup>4</sup> What, then, was the nature of the Russian possession of Moldavia? From 1826 it enjoyed an independent administration under the suzerainty of Turkey. In 1853 Russia entered the Principality, proclaiming that the occupation was provisional. Upon war between Russia and Turkey, the nature of the occupation was not changed. Subsequently England and France became allies of Turkey. In 1854 Russian troops retired from Moldavia, which never became part of the dominions of Russia; its inhabitants never became enemies of those with whom Russia was at war.<sup>5</sup>

Thus, on the facts of *The Gerasimo*, the occupation was provisional only and strategic—a "belligerent occupation"; there was not "even an attempt at civil control."<sup>6</sup> If Lord Kingsdown meant that for the purposes of war "the national

<sup>1</sup> "Will anyone contend that a government which is obliged to yield in any quarter to a superior force becomes a co-belligerent with the power to which it yields?" 1 Campb, 433.

<sup>2</sup> (1813), 1 M. & S. 450.

<sup>3</sup> (1809), 1 Edwards 171, *supra*, 102.

<sup>4</sup> (1851), 11 Moo. P.C., 88, at 101.

<sup>5</sup> *Ib.*, at 105.

<sup>6</sup> [1943] A.C. 203, at 245, *per* Lord Porter. See also *per* Lord Atkin, at 214.

character" of a country changed only when, by cession or conquest or other means, the country became "incorporated with" the dominions of the invader, his statement is wider than was necessary for the decision, and is wrong.

"A conquest during war," said Lord Wright in *The Sofracht Case*, "may in a sense be temporary, as was that of Demerara by the French, and may be reversed either by reconquest or by surrender but, if while it lasts there is what is called firm possession for a sufficient period with the intention of keeping it unless it is reconquered or surrendered, the national character of the place will generally, at least for the time, be changed."<sup>1</sup>

### 5. During War of 1914

(a) In *The Gutenfels*,<sup>2</sup> the question was whether Port Said, as regards Germany, was an enemy port. On 5th August, 1914, a German merchant ship had arrived there unaware that war between Great Britain and Germany had broken out. In port she remained as in a port of refuge until 13th October, when the Egyptian Government took possession of her. She never asked for a pass, nor was she offered one. On 16th October, she was conducted to sea to a British cruiser, which seized her as prize and took her to Alexandria. War had not yet been declared between Great Britain and Turkey, nor had Egypt been declared a British protectorate. The court held that, by the Hague Convention No. VI of 1907, which, it was assumed, applied, since the *Gutenfels* had not been offered a pass to a neutral port, she must be detained until further order; the ultimate rights to be determined after the war.

Lord Wrenbury observed that Port Said was an enemy port to Germany, having regard to the relations between Great Britain and Egypt, to the anomalous position of Turkey, and to the British military occupation of Egypt.<sup>3</sup> The following passage from Hall's *International Law* was approved:—

"When a place is militarily occupied by an enemy, the fact that it is under his control, and that he consequently can use it for the purposes of his war, outweighs all considerations founded on the bare legal ownership of the soil."<sup>4</sup>

(b) In *Société Anonyme Belge des Mines d'Aljustrel (Portugal) v. Anglo-Belgian Agency, Ltd.*,<sup>5</sup> the plaintiff company incorporated in Belgium had its registered office at Antwerp. After a large part of Belgium (including Antwerp) had passed into the effective

<sup>1</sup> [1943] A.C. 203.

<sup>2</sup> [1916] 2 A.C. 112.

<sup>3</sup> *Ib.*, 118.

<sup>4</sup> 6th ed., p. 505.

<sup>5</sup> [1915] 2 Ch. 409. See McNair, 325.

military occupation of Germany, the business at Antwerp was closed and the books were removed to London, where the business was carried on. Younger, J., held that neither at common law nor under the Trading with the Enemy Acts, 1914 and 1915, was the company an enemy; the company must be treated as an enemy, however, within a Proclamation of February, 1915, because it was situate in "territory in hostile occupation." The Court of Appeal reversed the decision on the ground that, although a large portion of the country was in the effective military occupation of an enemy, the country as a whole was not "territory in hostile occupation."

The decision is not an authority for the position at common law. The question there was whether the company was an alien enemy under the proclamations.<sup>1</sup>

In consequence of the decision, a proclamation was promulgated, by which the "enemy," for the purpose of the proclamation, was declared to include and to have included a company, wherever incorporated, carrying on business in an enemy country or in any territory "for the time being in hostile occupation."<sup>2</sup>

(c) In *The Leonora*<sup>3</sup> a Dutch steamship bound from Rotterdam to Stockholm with coal from Belgium, sold by a department of the German Government in Brussels, was seized as prize off the Dutch coast. The coal had been "won, sold and shipped" for the benefit of the enemy in prosecuting the war. An Order in Council of February, 1917 (in retaliation to a memorandum of the German Government preventing sea traffic in zones adjacent to the Allies), provided that vessels met at sea on their way to or from neutral ports which afforded access to enemy countries would, *prima facie*, be deemed to be carrying goods with an enemy destination or of enemy origin, and that such goods would be subject to condemnation. This coal was of "enemy origin"; ship and cargo were properly condemned; the order was not contrary to the law of nations.

Sir Samuel Evans, P., in a magnificent judgment, pointed out that the German declaration substituted "indiscriminate destruction for regulated capture."<sup>4</sup> Hence the retaliatory orders. The legitimate object of a belligerent is to destroy or cripple the enemy's commerce; an inevitable result is interference with the trade of neutrals.<sup>5</sup> He refers to the retaliatory orders made in 1807 and 1809 during the Napoleonic War,

<sup>1</sup> But see the discussion by Pickford, L.J., *dubitante*, at 425, 426, who applies the right test. And see Lord Porter's exposition of this case: [1943] A.C., at 247, 248.

<sup>2</sup> [1915] 2 Ch. 430.

<sup>3</sup> [1918] P. 182; [1919] A.C. 974.

<sup>4</sup> [1918] P. 182, 191-235, at 195.

<sup>5</sup> *Id.*, 202.

when conditions (with the exception of the submarine) were similar.<sup>1</sup> The propriety of these orders was supported by Sir William Grant (Master of the Rolls) and Sir William Scott,<sup>2</sup> and was later upheld in the Prize Court.<sup>3</sup> In the present case, the Brussels Coal Department exercised complete control. Even if the Belgian owners had been permitted to work it themselves and to produce and dispose of it for their own profit, it would have been "of enemy origin" within the meaning of the Order in Council.<sup>4</sup>

The decree of the Prize Court was upheld in the Privy Council.<sup>5</sup> Lord Sumner said: "... these coals were won, sold, and shipped as part of a German Government trade, carried on for the benefit of the enemy in prosecuting the war. To deny to them the term 'of enemy origin,' as used in the order, would be pedantic."<sup>6</sup> The right of retaliation had been affirmed by the Privy Council in *The Stigstad*.<sup>7</sup> Certain belligerent rights, Lord Sumner continued, e.g., the right of blockade or the right of preventing traffic in contraband of war, may be enforced even against neutrals, because without those rights maritime war would be frustrated.<sup>8</sup> The proclamation of a blockade and the notification of a list of contraband did not create new offences, but were merely an exercise of legal rights. "Capture and condemnation are the prescriptive and established modes by which the law of nations as applicable to maritime warfare is enforced."<sup>9</sup> The belligerent does not create an offence; it is the law of nations which recognises the right and makes the violation of that right, when availed of, an offence.<sup>10</sup> Sir William Scott's doctrine was that "retaliation is a branch of the rights which the law of nations recognises as belonging to belligerents, and that it is as much enforceable by Courts of Prize as is the right of blockade."<sup>11</sup> In the present case, retaliation was justified "in the interest of the common good," even at the cost of risk and inconvenience to neutrals.<sup>12</sup>

<sup>1</sup> [1918] P. 182, at 209.

<sup>2</sup> *Ib.*, 213, 216.

<sup>3</sup> *The Nymph* (1810), unreported. Cited at 222-224, and other cases cited at 225, 226.

<sup>4</sup> *Ib.*, 231.

<sup>5</sup> [1919] A.C. 974, 981, 982.

<sup>6</sup> *Ib.*, 982.

<sup>7</sup> [1919] A.C. 279.

<sup>8</sup> [1919] A.C. 974, 984.

<sup>9</sup> *Ib.*, 985.

<sup>10</sup> *Ib.*, 986.

<sup>11</sup> *Ib.*, 987.

<sup>12</sup> *Ib.*, 991.

## IV. ENEMY CORPORATION

1. *For Purposes of Trading with the Enemy Act, 1939*

Each of the following is an "enemy" as defined by, and for the purposes of, the Trading with the Enemy Act, 1939:—

"(c) any body of persons (whether corporate or unincorporate) carrying on business in any place, if and so long as the body is controlled by a person who, under this section, is an enemy, or

"(d) any body of persons constituted or incorporated in, or under the laws of, a State at war with His Majesty ;

"(e) as respects any business carried on in enemy territory, any individual or body of persons (whether corporate or unincorporate) carrying on that business.

The term "does not include any individual by reason only that he is an enemy subject."<sup>1</sup>

It is submitted that the English branch office of an enemy corporation is also, for this purpose, an alien enemy.<sup>2</sup>

Of this definition, the first limb restates "the test of control"—the common law criterion of the enemy character of a corporation, as propounded, *obiter*, by Lord Parker (with whom Lord Sumner concurred) in *The Daimler Case*<sup>3</sup>; the second limb seems to be based upon the experience of the last war; the third limb has regard to commercial domicile.

*For the purpose of the Trading with the Enemy legislation during the last war*, incorporation in an "enemy country" was the original test of enemy character. By the Trading with the Enemy Act, 1914,<sup>4</sup> it was illegal to trade with the enemy, i.e., to do any act prohibited by or under Royal Proclamation. "Enemy country" meant the territories of the German Empire, Austria-Hungary and all its colonies and dependencies.<sup>5</sup> "Enemy" was defined by proclamation as "any person or body of persons of whatever nationality resident or carrying on business in the enemy country, but does not include persons of

<sup>1</sup> Section 2 (1), as amended by the Defence (Trading with the Enemy) Regulations, 1940 (S.R. & O. 1940, No. 1092), *supra*, p. 92, note 2.

The word "individual" in the penultimate line, was, in the original definition, substituted for "person" (which includes a company).

<sup>2</sup> Contrast *Ingle, Ltd. v. Mannheim Continental Insurance Co.* [1915] 1 K.B. 227, 230, 232, *per* Bailhache, J., where the branch office in London of a German insurance company had a commercial domicile in England; apart from the Proclamation of 8th October, 1914, it would not have been an alien enemy. See also *Wolf & Sons v. Carr, Parker & Co., Ltd.* (1915), 31 T.L.R. 407, 408, and *In re Continho, Caro and Co.* [1918] 2 Ch. 384, for the distinction made by Younger, J., between a "branch" and an "office." And see *Orenstein & Koppel v. The Egyptian Phosphate Company, Ltd.* [1915] S.C. 55, 60, *per* Lord President Strathclyde.

<sup>3</sup> *Daimler Co., Ltd. v. Continental Tyre & Rubber Co. (Great Britain), Ltd.* [1916] 2 A.C. 307, 339, 340.

<sup>4</sup> Section 1 (2).

<sup>5</sup> 9th September, 1914, cl. 2.

enemy nationality who are neither resident nor carrying on business in the enemy country." The section proceeded: "In the case of incorporated bodies, enemy character attaches only to those incorporated in an enemy country."<sup>1</sup> By the Trading with the Enemy Amendment Act, 1914, a custodian trustee was appointed to whom a return had to be made by persons holding or managing property on behalf of an enemy. "Enemies" were defined as "persons and bodies of persons resident or carrying on business in any country with which His Majesty is for the time being at war." The proclamations relating to trading with the enemy were subsequently applied to "territory in hostile occupation."<sup>2</sup>

In *Société Anonyme Belge des Mines d'Aljustrel v. Anglo-Belgian Agency, Ltd.*,<sup>3</sup> the Court of Appeal held that in July, 1915, a company incorporated in Belgium, whose registered office was at Antwerp, was not incorporated in an "enemy country," for, although a large portion, including Antwerp, was occupied, the whole of Belgium was not then under the effective control of Germany. In consequence of this decision, the term "enemy" was declared by proclamation to include and to have included "any incorporated company or body of persons (wherever incorporated) carrying on business in an enemy country or in any territory for the time being in hostile occupation."<sup>4</sup>

(a) The meaning of "carrying on business" was examined in *Central India Mining Co., Ltd. v. Société Coloniale Anversoise*.<sup>5</sup> A company incorporated in India had agreed in January, 1914, to sell to a company incorporated in Belgium manganese ore to be delivered during 1914-1917, delivery in Bombay, shipments to European or American ports; the Belgian company, when asked, was to open an irrevocable credit in favour of the plaintiffs' agent at a London bank. In September, 1914, after the invasion of Belgium, the managing director in Antwerp, without authority from the other directors, who were in occupied Belgium, transferred the company's goods and cash to England and carried on business here in his own name, but for the benefit of the company. Upon the occupation of Antwerp, the German authorities placed the company under compulsory administration. Meetings of the directors were held in Brussels, at which formal business was transacted. The board agreed in 1918 that the company's bankers should pay the coupons of the preference

<sup>1</sup> 9th September, 1914, cl 3

<sup>2</sup> Trading with the Enemy (Occupied Territory) Proclamation, 16th February, 1915, cl. 1.

<sup>3</sup> [1915] 2 Ch. 409. See, at 426, for the points of Pickford, L.J., *supra*, 110.

<sup>4</sup> At 430; 14th September, 1915.

<sup>5</sup> [1920] 1 K.B. 753.

shares to prevent the German authorities from calling up the capital. Shareholders' meetings had been held at which accounts were approved in order to comply with Belgian law, and to maintain the company's existence. Debts were collected and debts were paid to prevent the German authorities from winding up the company and investing the uncalled capital in German war loan. The plaintiffs claimed a declaration that the defendants having become enemies, the agreement was abrogated. Rowlatt, J., gave them judgment. Carrying on business referred, as in the Income Tax Acts, to "operations at the head office, where the head and brains and seat of the company were."<sup>1</sup> The Court of Appeal held that, although formal acts to keep the company alive might not amount to "carrying on business," yet the collection and payment of debts in order to continue the business amounted to "carrying on business," and constituted the company an "enemy."

"Carrying on business," is a question of fact.<sup>2</sup> Acts necessary to keep the company in existence would not amount to carrying on business; they are analogous in the case of an individual trader to the taking of sufficient nourishment to keep himself alive.<sup>3</sup> But the collection and payment of debts were carried on for the purpose of continuing business; that buying and selling were impossible was immaterial. If deliveries had been made outside Belgium, they would have been for the benefit of a concern in territory controlled by the Germans.<sup>4</sup>

(b) Perhaps the *best definition* of the term "*carrying on business*" is in *Erichsen v. Last*,<sup>5</sup> frequently approved in the House of Lords.<sup>6</sup> A Danish telegraph company had three marine cables in connection with the United Kingdom worked by the company's servants. They received messages in London and all over the country, which were sent to Denmark by their own wires and by the wires of foreign governments, and thence to distant foreign places. The charges were collected by the Post Office who, after deducting dues, handed them to the company's London branch who retained the amount due to them and paid the residue to the companies entitled. The company made no profit from the transmission of messages over the land lines in the United Kingdom. The company, it was held, "exercised a trade" within the United Kingdom. Brett, L.J., declared:—

"I should say that wherever profitable contracts are habitually made in England, by or for foreigners, with persons

<sup>1</sup> [1920] 1 K.B., at 759.

<sup>2</sup> *Ib.*, at 765.

<sup>3</sup> *Ib.*, at 766.

<sup>4</sup> *Ib.*, at 772, *per* Duke, P.

<sup>5</sup> (1881), 8 Q.B.D. 414.

<sup>6</sup> *Nielsen Andersen & Co. v. Collins* [1928] A.C. 33, *per* Lord Dunedin. For a valuable exposition, see Farnsworth, App. V, 320-325, 329-332.

in England, because they are in England, to do something for or to supply something to those persons, such foreigners are exercising a profitable trade in England, even though everything to be done by them in order to fulfil the contracts is done abroad."<sup>1</sup>

And Cotton, L.J., said :—

"in my opinion when a person habitually does and contracts to do a thing capable of producing profit, and for the purpose of producing profit, he carries on a trade or business."<sup>2</sup>

(c) A foreign corporation can be served under Ord. IX, r. 8, if it "carries on business" in this country. In *Thames and Mersey Marine Insurance Company v. Societa di Navigazione*,<sup>3</sup> a foreign steamship company employed London agents to make contracts of carriage and to book freight. The agents received commission and a salary and allotted a separate staff in a separate part of the building to the defendant's business. Buckley, L.J., said :—

"If contracts have been habitually made for a reasonably substantial period of time at a fixed place of business within the jurisdiction by a firm or person there, without referring each time to the foreign corporation for instructions, and with the result that the foreign corporation has become bound to another party, then the foreign corporation for the present purpose carries on business at that place."<sup>4</sup>

## 2. Commercial Domicil of Corporation

A corporation, equally with an individual, becomes affected with enemy character by voluntary residence in enemy territory. Before the last war, the House of Lords, affirming judicial opinion extending over forty years, had twice laid it down that for the purpose of income tax a company "resides" where "its central control and management actually abides": i.e., where its directors meet to exercise their powers and to control the company's affairs: it is not the country of incorporation, but the country of control that counts. A learned author, after an illuminating examination of the authorities, has conclusively shown that in the *Daimler Case*, the House of Lords was merely

<sup>1</sup> 8 Q.B.D., 418.

<sup>2</sup> *Ib.*, 420. See Lord Herschell's exposition in *Grainmer & Son v. Gough* [1896] A.C. 325, 336; and see *per* Viscount Dunedin, in *Turn v. Scanlan* [1928] A.C. 34, 48, 49, that *Ericksen v. East* was "practically" binding on the House.

<sup>3</sup> (1914), 111 L.T. 97, 98, 99.

<sup>4</sup> See Buckley, L.J.'s analysis in *Okura & Co., Ltd. v. Forsbacka Jernverks Aktiebolag* [1914] 1 K.B. 715, 718, 719, and *per* Langton, J., in *The Lalandia* [1933] P. 56, 61. See also *The Tovarishstvo Case* [1944] 1 Ch. 404, 410-412, *per* Cohen, J. For the wider test in American law, see Farnsworth, 325-9, 332-41.



'applying the rule laid down in a long series of decisions upon taxation.<sup>1</sup>

(a) In *Cesena Sulphur Co., Ltd. v. Nicholson*,<sup>2</sup> the company, incorporated in England, was afterwards registered in Italy. It was formed to buy sulphur mines in Italy and to carry on there the mining, manufacturing and merchanting. Under the articles, sulphur mines might be bought anywhere. An English board of directors managed the general business of the company and the working and disposal of the mines; an Italian delegation conducted affairs in Italy. Manufacture and sale were carried on in Italy where profits were earned; the dividends for English shareholders were the only part of the profits sent to England. The court held that "almost every act of the company connected with the administrative part of the business is to be done in London": the place whence orders flowed, where officers and agents were appointed and recalled, where powers were granted and revoked, where money was received and dividends were declared and payable.<sup>3</sup> The main place of business was in England: there the company resided.

The words of Huddleston, B., have been frequently quoted:—

"Registration, like the birth of an individual, is a fact which must be taken into consideration in determining the question of residence. It may be a strong circumstance, but it is only a circumstance. It would be idle to say that in the case of an individual the birth was conclusive of the residence. So drawing an analogy between a natural and an artificial person, you may say that in the case of a corporation the place of its registration is the place of its birth, and is a fact to be considered with all the others. If you find that a company which is registered in a particular country, acts in that country, has its office and receives dividends in that country, you may say that those facts, coupled with the registration, lead you to the conclusion that its residence is in that country."<sup>4</sup>

Of the "artificial residence" to be assigned to an "artificial person," the test is: "Where was the place where the real and substantial business of the company was carried on."<sup>5</sup>

This decision has been repeatedly approved and followed.

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<sup>1</sup> Farnsworth, *The Residence and Domicil of Corporations* (1939), 126-147. This monograph contains a valuable analysis of American authorities and extensive references to Anglo-American legal literature.

See also Note, "A.F." (1944), 60 L.Q.R. 16-19.

<sup>2</sup> (1876), 1 Ex D 423.

<sup>3</sup> *Ib.*, 455.

<sup>4</sup> *Ib.*, 453.

<sup>5</sup> *Ib.* 454.

(b) In *De Beers Consolidated Mines, Ltd. v. Howe*,<sup>1</sup> the question was whether the company registered in South Africa, whose directors and life governors lived in England, where, except in mining operations, the real control was exercised, ought to be assessed to income tax as a "person residing in the United Kingdom." It had been argued that a company resides where it is registered and nowhere else. Lord Loreburn, L.C., approving the decision in the *Cesena Sulphur Case*, declared that in applying to a company the conception of residence, one must proceed as far as possible upon the analogy of an individual:

"A company cannot eat or sleep, but it can keep house and do business. We ought, therefore, to see where it really keeps house and does business. An individual may be of foreign nationality, and yet reside in the United Kingdom. So may a company . . . a company resides for purposes of income tax where its real business is carried on . . . The real business is carried on where the central management and control actually abides."

This is a *pure question of fact* to be determined upon a scrutiny, not of regulations, but of "the course of business and trading."

(c) The House reaffirmed this reasoning in *The American Thread Co. v. Joyce*.<sup>2</sup> A company registered in the United States owned cotton mills there for manufacturing cotton thread, none of which was sold in the United Kingdom. The company was promoted by the English Sewing Cotton Company, which owned the common stock of the American company. Regular meetings of the American directors were held in America and extraordinary meetings of the English directors (who formed the majority), being also directors of the Sewing Company, in the company's office in Manchester. The powers of buying or taking a lease of business or plant, the sale and lease of real estate, the borrowing of money, the selection of the executive committee of directors, the filling of casual vacancies among directors and the appointment of higher officials; all these powers were reserved to the board in extraordinary meeting, i.e., in the United Kingdom. At those meetings the board decided upon the dividend, and supervised accounts and processes of manufacture in use in America. The Commissioners found that the control of the company rested with the directors in extraordinary session in England, and that the company was resident in the United Kingdom. The courts held that there was abundant evidence to justify this conclusion. Buckley, L.J., said:—

"A corporation, like an individual, may have more than one place of residence. The place which immediately occurs to one as presumably its place of residence is the place of

<sup>1</sup> [1906] A.C. 455, 458. See Viscount Sumner's exposition of the *ratio decidendi* in *Egyptian Delta Land & Investment Co. v. Todd* [1929] A.C. 1, 23–25.

<sup>2</sup> (1913), 6 Tax Cas. 1; 163 (H.L.).

incorporation . . . But that is not necessarily its only place of residence. There is a place of residence for the purpose of income tax, and . . . if . . . the head and seat and directing power of the affairs of the company are in the United Kingdom, from whence the chief operations of the company . . . are controlled, managed and directed, then it is plain, upon authority, that it is residing in that place."<sup>1</sup>

The shareholders could, no doubt, by their votes, control the company: they could compel the directors to do their will: "but it does not follow that the incorporators are managing the corporation. The contrary is the truth; they are not. It is the directors who are managing the affairs of the corporation . . ."<sup>2</sup> Although buying and selling and fixing of prices were done in New York, the "*real control*" was in Manchester with a directorate "of paramount authority."<sup>3</sup>

(d) For the purposes of income tax a company may have *more than one residence*. So the House of Lords held in *Swedish Central Railway Co., Ltd. v. Thompson*.<sup>4</sup> An English company, whose object was to construct and work a railway in Sweden, upon its construction leased it to a Swedish company and removed control and management of the company to Sweden. Formal administrative business continued to be transacted in London: transfers, the signing of cheques on the London banking account, the making up and auditing of the accounts, the payments of dividends to English shareholders.

"An individual may clearly have more than one residence," said Viscount Cave, L.C.,

"and on principle there appears to be no reason why a company should not be in the same position. The central management and control of a company may be divided, and it may 'keep house and do business' in more than one place; and if so, it may have more than one residence."

(e) In *Egyptian Delta Land & Investment Co., Ltd.*,<sup>5</sup> an English company had transferred its business to Egypt and, beyond fulfilling its statutory requirements, did nothing in England. The Commissioners found that the company was not resident in England. The directors had not met in the United Kingdom; the seal was in Egypt; to Egypt the minute books had been removed, and the company's banking account was at Cairo. Transfers were registered in Cairo; dividends were declared and paid there. Meetings were held in Cairo; from there were sent the reports of the directors.

<sup>1</sup> (1913), 6 Tax Cas., at 31, 32.

<sup>2</sup> *Ib.*, at 33.

<sup>3</sup> *Ib.*, at 164, per Lord Haldane, L.C.

<sup>4</sup> [1925] A.C. 498, 501 (Lord Atkinson, dissenting).

<sup>5</sup> [1929] A.C. 1.

It was contended that incorporation in England makes a British company within the Income Tax Act, 1918, a "person resident in the United Kingdom." The Companies (Consolidation) Act, 1908, said nothing about the "residence" of a company, said Viscount Sumner in an exhaustive review of the authorities.<sup>1</sup> The residence of a company was not analogous to the residence of an individual; nor was residence "inherent in a company in the nature of things."<sup>2</sup> The "only really possible analogy" between a natural person and a company is that of carrying on a business: for the purposes of income tax, the residence of a foreign company is "preponderantly, if not exclusively, determined by this kind of fact."<sup>3</sup> The incorporation of a company "at most does no more than bring the embryo company to the birth, which in a natural person is not the test."<sup>4</sup> The company, it is true, becomes amenable to English law and the English courts, and here it may be wound up. "The domiciled Englishman is similarly under this personal law as to marriage and divorce, intestate administration, and bankruptcy."<sup>5</sup> The keeping of lists and registers does not constitute a residence. "At night and on Sundays and holidays you will not find the company at its head office, except in a mystical sense, but . . . a truer analogy and a more satisfying residence is to be found in 'keeping house and doing business' there than in a continuous statutory presence, even during the hours of darkness and of divine worship . . . Though the spirit of the company may be imagined to brood over these arrangements, I do not see how the company itself is there at all. The office is its English address, but its business may be elsewhere. If this is 'residence,' I think it is 'residence' not by analogy to that of a natural person, but by an independent metaphor. At any rate, if it is to be called 'residence,' only the Legislature can do it."<sup>6</sup> *For British and foreign companies alike, the test of residence is where on the facts (including the fact of incorporation) "the company's business is really directed and carried on."*<sup>7</sup>

<sup>1</sup> [1929] A.C., at 10-34.

<sup>2</sup> *Ib.* 11.

<sup>3</sup> *Ib.*, 12.

<sup>4</sup> *Ib.*, 13.

<sup>5</sup> *Ib.*, 14.

<sup>6</sup> *Ib.*, 15.

<sup>7</sup> *Ib.*, 16. See also the delightful speech of Viscount Sumner in *Inland Revenue Commissioners v. Lysaght* [1928] A.C. 234, 243-6. Upon these cases, see Cheeshire, 200-202; and for a criticism, A. Goldstein, *The Residence and Domicil of Corporations with special reference to Income Tax* (1935), 51 L.Q.R. 684-698.

See also H. H. Stikeman, "Carrying on Business in Canada," in *Dominion Income Tax Law* (1942), 20 Can. Bar. Rev. 77-108.

### 3. *The Daimler Case*

The test of "control"—the criterion of the residence of a company for the purposes of income tax—was applied during the last war as the criterion of the enemy character of a company. Lord Parker's propositions in the *Daimler Case*,<sup>1</sup> although criticised at the time as a violation of the principle in *Salomon's Case*—that a company is, at law, a different person from the subscribers to the memorandum,<sup>2</sup>—would now appear to follow naturally from the above decisions.<sup>3</sup> The case has not been followed, however, in America.<sup>4</sup>

A limited company was incorporated in England, with a capital of £25,000 in £1 shares, to sell German tyres made by a German company who held most of the shares. The secretary—the holder of one share—was a naturalised British subject of German origin; the remaining shares were held by the Germans in Germany. After the outbreak of war, the secretary instructed the company's solicitors to issue a specially endorsed writ for a trade debt due to the company. At the date of the writ all the shares, except one, were held by Germans. All the directors were Germans; three of the four directors were resident in Germany; the fourth, upon the outbreak of war, had left England for Germany. In answer to a summons for judgment, the defendants alleged, *first*, that the company was an alien enemy and that payment would be trading with the enemy; *secondly*, that the action was begun without the authority of the company. The master gave liberty to sign judgment; Scrutton, J., affirmed the order, and so did the full Court of Appeal, Buckley, L.J., dissenting.<sup>5</sup> The House of Lords held that the action was begun without authority and ought to be struck out.

In the Court of Appeal the defendants argued that the enemy shareholders were the real "*persona*" carrying on the business; for their benefit the payment of the debt would enure.<sup>6</sup> The directors alone could bring an action on behalf of the company, and upon the outbreak of war their authority was abrogated. No reliance was placed upon the income tax cases or the principle

<sup>1</sup> [1916] 2 A.C. 307, 344-6.

<sup>2</sup> *Salomon & Co., Ltd. v. Salomon* [1897] A.C. 22, 51, *per* Lord Macnaghten.

<sup>3</sup> See Farnsworth, *op. cit.*, 127, 128 *et seq.* McNair, who criticised the decision in *The National Character and Status of Corporations*, B.Y. 1923-4, 44-59, at 53, 54, has withdrawn his criticism in (1942), 58 L.Q.R. 214-216. See Hogg, *Companies with Enemy Shareholders* (1915), 31 L.Q.R. 170-172; (1917), 33 L.Q.R. 76, 77; McNair, 62-65; 2 Pitt Cobbett, 39-42.

<sup>4</sup> The American common law doctrine is that a corporation does not exist, and therefore cannot reside, outside the state of its charter: Farnsworth, 141; Norem, *The Determination of Enemy Character of Corporations* (1930), *A.J.I.L.*, vol. 24 310-336; *infra*, 127-131.

<sup>5</sup> [1915] 1 K.B. 893.

<sup>6</sup> *Id.*, 897.

of residence in the country of control. Lord Reading, C.J. (delivering the judgment of the majority), said that an "English company," upon war, could not cease to be an English company: the residence of its shareholders or directors was immaterial.<sup>1</sup> A company has a "real existence": "it cannot be technically an English company and substantially a German company, except by the use of inaccurate and misleading language. . . . It is a living thing with a separate existence which cannot be swept aside as a technicality. It is not a mere name or mask or cloak or device to conceal the identity of persons. . . . It is a legal body clothed with the form prescribed by the Legislature."<sup>2</sup>

Buckley, L.J., dissenting, pointed out that although a corporation is a legal person apart from its corporators, it cannot exist without corporators. The corporation exists only in the contemplation of law: "apart from its corporators it can have neither thoughts, wishes, nor intentions, for it has no mind other than the minds of the corporators."<sup>3</sup> A British corporation is, for most purposes, in the position of a British subject, but it cannot be correctly described as a British subject: it cannot owe or pay allegiance to the King, or serve the King physically; it can be neither loyal nor disloyal. In the present case, "The artificial legal thing is British, resident in England. But all its corporators who can have thoughts, wishes or intentions are Germans resident in Germany."<sup>3</sup> The legal entity has "no independent power of motion. It is moved by the corporators."<sup>4</sup> The court can go behind the corporate name, and see who are the parties really interested.

When the case was argued before the House of Lords, the appellants contended that if "the whole thinking power" of the company was German, the corporation was German. Wherever the company is incorporated, a company resides where its "real business" is carried on, i.e., where "the central control and management" abide.<sup>5</sup> They cited the cases on income tax. All the corporators save one, being alien enemies, were incapable of doing any corporate act on behalf of the Company—"struck with sterility by the outbreak of war."<sup>6</sup>

The House of Lords (of which eight members sat) held that the action was begun without authority. The directors, Germans resident in Germany, were the King's enemies and were incapable of authorising the action. The secretary could not authorise it nor, in the absence of a regular directorate, could he *virtute*

<sup>1</sup> [1915] 1 K.B., at 903

<sup>2</sup> *Ib.*, 904.

<sup>3</sup> *Ib.*, 916.

<sup>4</sup> *Ib.*, 918.

<sup>5</sup> [1916] 2 A.C. 307, at 311.

<sup>6</sup> *Ib.*, 312.

*officii* manage its affairs. To consider any further point was strictly unnecessary, and the remaining observations were *obiter dicta*, but Lord Parker of Waddington (whose judgment was prepared with the assistance and collaboration of Lord Sumner) examined the circumstances under which a company incorporated in the United Kingdom, could assume an enemy character. His reasoning and the propositions that he laid down have been accepted as the law by Russell, J. (as he then was),<sup>1</sup> and by the Court of Appeal,<sup>2</sup> and accurately and authoritatively state the law. Lord Wright, however, in *The Sovfracht Case*, appeared to cast some doubt upon them.<sup>3</sup>

"Voluntary residence among the enemy," said Lord Parker. "however passive or pacific he may be, identifies an English subject with His Majesty's foes." "In the case of an artificial person," he asks, "what is the analogue to voluntary residence among the King's enemies? Its impersonality can hardly put it in a better position than a natural person and lead to its being affected by anything equivalent to residence."<sup>4</sup> Only by a figure of speech has a company a nationality or a residence. If the place of its incorporation fixes its residence, "its residence cannot be changed, which is almost a contradiction in terms, and in the case of a company residence must correspond to the birthplace and country of natural allegiance in the case of a living person, and not to residence or commercial domicile. Nevertheless, enemy character depends on these last. It would seem, therefore, logically to follow that, in transferring the application of the rule against trading with the enemy from natural to artificial persons, something more than the mere place or country of registration or incorporation must be looked at. My lords, I think that the analogy is to be found in control, an idea which, if not very familiar in law, is of capital importance and is very well understood in commerce and finance."<sup>5</sup>

Thus, "the acts of a company's organs" within the scope of their authority may invest the company with enemy character. The character of those who appoint and supervise those officers may have a similar effect upon the character of the company.

<sup>1</sup> *In re Badische Co.* [1921] 2 Ch. 331, 371.

<sup>2</sup> *In re Hilckes* [1917] 1 K.B. 48.

<sup>3</sup> [1943] A.C. 203, 235. But see at 211, *per* Viscount Simon, L.C.

<sup>4</sup> [1916] 2 A.C. 307, 339. See the citation of Farnsworth, *op. cit.*, 70, Note (b), from the judgment of Isaacs, J., in *The Australian Temperance Society, etc., Ltd. v. Howe* (1922), 31 C.L.R. 290, 309, 312: "And as these corporations more and more assume the functions of individuals, so more and more does the law attribute to them conceptionally and by analogy individual attributes in keeping with the social functions they are in fact performing."

<sup>5</sup> *Ib.*, 339, 340.

<sup>6</sup> *Ib.*, 340.

Lord Parker seeks to distinguish between questions of property and capacity, of acts done and rights acquired, from the *character* in which property is held, capacity is enjoyed, and acts are done. He cites *Bank of the United States v. Deveaux*,<sup>1</sup> where Marshall, C.J., implied that for certain purposes the court must look behind the corporation to the corporators. The question was whether a bank could be a "citizen" of a State, the jurisdiction of Federal Courts being restricted "to controversies between citizens of different States." He held that a "mere legal entity, a corporation aggregate, is certainly not a citizen"; it therefore could not sue or be sued in the courts of the United States unless the rights of the members could be exercised in their corporate home.<sup>2</sup> The controversy was between persons "suing in their corporate character, by their corporate name, for a corporate right," and the defendant. "Substantially and essentially," the parties, where the corporators are aliens, "come within the spirit and terms of the jurisdiction." (It must be pointed out, however, that this case has not been followed and that the American doctrine appears to be that the character of the corporators does not affect the character of the corporation: "At the present time," said Lehman, J., "the courts of this country are entirely wedded to the doctrine that the corporators of a corporation are conclusively presumed to be citizens of the same State as the corporation."<sup>3</sup>)

#### 4. Lord Parker's Propositions

Lord Parker propounds the following six propositions<sup>4</sup> :—

"(1) A company incorporated in the United Kingdom is a legal entity, a creation of law with the status and capacity which the law confers. It is not a natural person with mind or conscience. To use the language of Buckley, L.J., 'It can be neither loyal nor disloyal. It can be neither friend nor enemy.'

(2) Such a company can only act through agents properly authorised, and so long as it is carrying on business in this country through agents so authorised and residing in this or a friendly country it is *prima facie* to be regarded as a friend, and all His Majesty's lieges may deal with it as such.

(3) Such a company may, however, assume an enemy character. This will be the case if its agents or the persons in *de facto* control of its affairs, whether authorised or not,

<sup>1</sup> (1809), 9 U.S. (5 Cranch) 61, 81.

<sup>2</sup> *Ib.*, 86-88.

<sup>3</sup> *Fritz-Schultz Co. v. Ruess Co.* (1917 100 Misc. (N.Y.) 697), cited by Garner, *International Law and the World War*, vol. I, 227; Farnsworth, 146. And see E. J. Schuster, *The Nationality and Domicil of Trading Corporations*, 12 *Grotius Society* (1917), 57-85, at 61, 82; upon Lord Parker's speech, 80-84.

<sup>4</sup> [1916] 2 A.C. 344, 345, 346.



are resident in an enemy country, or, wherever resident, are adhering to the enemy or taking instructions from or acting under the control of enemies. A person knowingly dealing with the company in such a case is trading with the enemy.

(4) The character of individual shareholders cannot of itself affect the character of the company . . . The enemy character of individual shareholders and their conduct may, however, be very material on the question whether the company's agents or the persons in *de facto* control of its affairs, are in fact adhering to, or taking instructions from, or acting under the control of, enemies. This materiality will vary with the number of shareholders who are enemies and the value of their holdings . . .

(5) In a similar way a company registered in the United Kingdom, but carrying on business in a neutral country through agents properly authorised and resident here or in the neutral country is *prima facie* to be regarded as a friend, but may, through its agents or persons in *de facto* control of its affairs, assume an enemy character.

(6) A company registered in the United Kingdom but carrying on business in an enemy country is to be regarded as an enemy."

### 5. *Daimler Doctrine in Operation*

Two cases in prize, though they concerned the interpretation of s. 1 (d) of the Merchant Shipping Act, 1894, illustrate the reasoning in the *Daimler Case*.<sup>1</sup>

A ship is not deemed to be a British ship unless it is owned wholly by bodies corporate established under and subject to the laws of some part of His Majesty's dominions, "and having their principal place of business in those dominions."

(a) The *Polzeath*, until October, 1914, known as the *Walter Dammeyer*, and registered as a British ship, was owned by a British company. Its affairs were directed from Hamburg by the chairman of the board, a naturalised British subject of German origin who held the majority of the shares and lived in Hamburg both before and after the outbreak of the war. The principal place of business, it was held, was not within His Majesty's dominions and the ship was forfeit to the Crown.<sup>2</sup> The Hamburg director was "the life and driving force of this so-called English company . . . the English shareholders and directors as mere puppets pulled by his strings."<sup>3</sup>

<sup>1</sup> For the principal English decisions, see McNair, *B.Y.I.L.*, *op. cit.*, 50-52.

<sup>2</sup> [1916] P. 117; 241 (C.A.). The case came before Bargrave Deane, J., before the *Daimler* decision was given. His decision was cited before the Court of Appeal.

<sup>3</sup> *Ib.*, 122, 123, *per* Bargrave Deane, J.

(b) The *St. Tudno* belonged to a British company, but she was used as a tender for vessels of the Hamburg-Amerika Linie<sup>1</sup> coming to Southampton. To the instructions of that line, the directors were bound. By it they were appointed and could be removed. The profits belonged to the line, who owned the entire share capital issued by the company. The Procurator-General contended that the British company was "merely a marionette company entirely subordinated to the Hamburg-Amerika Linie, who are the real owners of the vessel."<sup>2</sup> "In this Court of Prize," said Sir Samuel Evans, P., "I have a right to, and am bound to, look at something beyond the nominal ownership."<sup>3</sup> The real owners were the *Linie*; the power of making directors and unseating them, of dictating their conduct, prescribing their duties, was exercised from Hamburg.

(c) In *Re Hilckes*,<sup>4</sup> the question was whether an English company that, until the outbreak of war carried on business in German territory by an agent resident there, under the sixth proposition of Lord Parker assumed enemy character. From H, a German resident in England, an English company had acquired a rubber estate in German East Africa; he was appointed the commercial agent of the company. All the directors and the majority of the shareholders were English. In 1917 the company claimed to prove in the bankruptcy of the debtor who had been interned as an alien enemy. Horridge, J., disallowed the proof. The Court of Appeal held that the mere fact that an English company carried on business in an enemy country through a properly appointed agent did not constitute the company an alien enemy and that the company was entitled to prove.

"We must look behind that and see who has the control of the company," said Lord Cozens-Hardy, M.R. "The directors are all English; the meetings are held in London; the secretary is English. What has sometimes been called the brain and heart of the company, the management and control of it, is beyond all doubt in London, exercised by an English board of directors. . . . In my opinion, it plainly is not an enemy company."<sup>5</sup>

The mere fact that, until the outbreak of war, an English company had a commercial agent in an enemy country does not make it an alien enemy.<sup>6</sup> Two distinct questions, said Warrington, L.J., must not be confused: *first*, is a person an alien enemy? *secondly*, is a person who is not an alien enemy, trading with the enemy?<sup>6</sup>

<sup>1</sup> [1916] P. 291, 293.

<sup>2</sup> *Ib.*, 295.

<sup>3</sup> [1917] 1 K B 48.

<sup>4</sup> *Ib.*, 54.

<sup>5</sup> *Ib.*, 56.

<sup>6</sup> *Ib.*, 58.

(d) Lord Sumner, in *The Hamborn*,<sup>1</sup> applied the *Daimler* test to a foreign corporation. A Dutch company owned a ship registered in Holland and flying the Dutch flag. The share capital was held by two nominally Dutch companies whose directors were Germans residing in Germany. Not a single person, who was not an enemy subject, was interested in these companies at the time of the capture of the ship. *The Hamborn* was a tender to the German iron industry on the Ruhr: "in substance she and her trade were a support to and a part of the commerce and the shipping of the German Empire."<sup>2</sup> The "centre and whole effective control" of the business was in Germany. Lord Sumner, quoting the *Daimler Case*, declared that "the right and power of control may form a true criterion"—the control of the active directors or the control of those who "in their turn are masters of the directorate and make or unmake it" by controlling the voting power. Here, "no living person and no sentient mind exercised or possessed any control over the Hamborn Steamship Company, except persons and minds of enemy nationality."<sup>3</sup>

(e) In *re Badische Co., Ltd.*,<sup>4</sup> the Bayer Corporation, though registered in England, was held by Russell, J., to be affected with enemy character, being controlled by persons resident in and nationals of, Germany. Having quoted the facts and the propositions in the *Daimler Case*, he proceeds: "He [*sc.* Lord Parker] decides that the character of the individual shareholders (though very material for some purposes) does not affect the character of the company, but that the true test is control, the analogue of that residence which invests an individual residing in an enemy country with enemy character . . . he means that, if at the outbreak of war, the control of the limited company is in the hands and power of persons resident in an enemy country, then on the outbreak of war the company assumes an enemy character."<sup>5</sup>

(f) Finally, in the *Sovfracht Case*,<sup>6</sup> Viscount Simon, L.C., in his second conclusion, declared that the test of enemy character was an "objective" test, "turning on the relation of the enemy Power to the territory where the individual voluntarily resides or the company is commercially domiciled or controlled." In that case, a Dutch company, with its principal place of business in Rotterdam, upon the subjugation of Holland became an alien enemy at common law. There was no evidence who the

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<sup>1</sup> [1918] P. 18, 25, Sir Samuel Evans, P.; [1919] A.C. 993.

<sup>2</sup> *Ib.*, 996.

<sup>3</sup> *Ib.*, 998.

<sup>4</sup> [1921] 2 Ch. 331.

<sup>5</sup> *Ib.*, 371.

<sup>6</sup> [1943] A.C. 203, 211, 235. See *Note* (1944), 60 L.Q.R. 16-19.

directors were, or what was their nationality. Lord Wright said that, in one sense, a corporation differs from an individual: the latter, "in theory at least," can withdraw from the enemy country, whereas a corporation formed under the laws of a foreign State depends "for its functions and existence" on the laws of the country of its incorporation. This made it difficult to apply to a company, as a test of character, the character of the persons in *de facto* control—the "test proposed" by Lord Parker in the *Daimler Case* and applied by the Privy Council in *The Hamborn*.<sup>1</sup>

Is Lord Wright criticising this test? It is too well established, it is respectfully submitted, upon the authority of Lord Sumner and Lord Parker. Moreover, is not Lord Wright thinking rather of the nationality and the *domicil* of a company—properly so called—which, in the case of a company, cannot be changed? He refers to the *Janson Case*<sup>2</sup> where, he observes, the House treated a company incorporated under the laws of the Transvaal as a *subject* of the Transvaal, and held that it became an alien enemy upon the outbreak of the South African War. The decision in that case was that the insurance against seizure of goods in contemplation of war was valid, since, however hostile the South African Republic was, war had not yet been declared. Lord Lindley, who agreed that *if nationality were material*, the company was a subject of the Transvaal Government and, upon the outbreak of war, became an alien enemy, explicitly declared: "When considering questions arising with an alien enemy, it is not the nationality of a person, but his place of business during war that is important."<sup>3</sup>

The *Daimler* doctrine was adopted in the Treaty of Versailles which permitted the Allied and Associated Powers to retain and liquidate property belonging to German nationals or "companies controlled by them."<sup>4</sup>

#### 6. American Criticism of *Daimler* Doctrine

The *Daimler* doctrine has been criticised by a learned American writer.<sup>5</sup> "It is difficult," he says, "to find justification for the dictum of Lord Parker in anything but the exigencies of war."<sup>6</sup> American law has departed from English law. Under the American Trading with the Enemy Act, 1917, a corporation

<sup>1</sup> *Supra*, 126.

<sup>2</sup> [1902] A.C. 235

<sup>3</sup> *Ib.*, at 505. And see Lord Parker's discussion of that case in *The Daimler Case* [1916] 2 A.C. 307, 342, 343.

<sup>4</sup> Article 297 (b); cited by Domke, 127.

<sup>5</sup> Ralph A. Norem, *Determination of Enemy Character of Corporations*, A.J.I.L., vol. 24 (1930), 310-336, at 319-323, 334-336.

<sup>6</sup> *Ib.*, 319.

is an enemy if incorporated under the laws of an enemy country or if, incorporated outside the United States, it carries on trade in enemy territory; it could not assume enemy character if incorporated within the United States.<sup>1</sup>

The *Daimler* decision, it is said, "was a clear case of judicial legislation which had only confusion as a result."<sup>2</sup>

"In American law, generally speaking, a corporation as either foreign or domestic is determined by the place of its origin, without reference to the residence of its stockholders or incorporators, or the place where its business is transacted."<sup>3</sup> The American courts have rejected the "control theory."<sup>4</sup>

In *The Society for the Propagation of the Gospel v. Wheeler*,<sup>5</sup> the society, established in England, claimed seisin of land in New Hampshire. The case was heard during the war with America and the tenants moved in arrest of judgment upon the ground that the demandants appeared by the record to be alien enemies. A corporation aggregate, said Story, J. has not generally any "commorancy," though its corporators have, but a corporation established in a foreign country is an alien corporation, and if the country become hostile it may for some purposes be clothed with the same character. A corporation may, for the repair of bridges, be an inhabitant, or for the liability to poor rates.<sup>6</sup> The society was therefore a "British alien corporation." But the court would go behind the corporate name and see who were the parties really interested; thus, if the members of the corporation were resident in the United States, though aliens, they would not be enemies.<sup>7</sup> The learned judge was disinclined to hold that a foreign society established for religious purposes might not have had a safe conduct or licence to pursue its remedies during war.<sup>8</sup> This case can no longer be looked upon as authority, for in *Shaw v. Quincy Mining Company*,<sup>9</sup> Gray, J., declared: "In *Bank of Augusta v. Earle*, 13 Pet. 519, 588, Chief Justice Taney said: 'It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created . . . It must dwell in the place of its creation, and cannot migrate to another

<sup>1</sup> *A.J.I.L.*, vol. 24, 331. "We have specifically abstained in this Bill from attempting to go behind the corporate charter": The Attorney-General of the United States in introducing the Bill to Congress (cited in 49 L.Q.R. 340).

<sup>2</sup> *Ib.*, 324.

<sup>3</sup> Domke, 122, citing (1940), 20 *Corpus Iuris Secundum*, s. 1784, p. 10.

<sup>4</sup> Domke, 130, and see chap. 9, *Enemy Controlled Corporations*, 126-144

<sup>5</sup> (1814), 2 Gallinson 105, 126-145.

<sup>6</sup> *Ib.*, 131.

<sup>7</sup> *Ib.*, 133, 134.

<sup>8</sup> *Ib.*, 135, 136.

<sup>9</sup> (1892), 145 U.S. 444.

sovereignty . . . ' This statement has often been reaffirmed by this court . . . The legal existence, the home, the domicile, the habitat, the residence, the citizenship of the corporation can only be in the State by which it was created, although it may do business in other States whose laws permit it."<sup>1</sup> In another case, Waite, C.J., said: "By doing business away from their legal residence, they do not change their citizenship, but simply extend the field of their operations. They reside at home, but do business abroad."<sup>2</sup> Waite, C.J., is also cited as saying: "A corporation cannot change its residence or its citizenship. It can have its legal home only at the place at which it is located by or under the authority of its charter; but it may, by its agents, transact business anywhere, unless prohibited by its charter, or excluded by local laws."<sup>3</sup>

*Behn, Meyer & Co. v. Miller*<sup>4</sup> is the leading American case. It was there held that a corporation organised in a British colony, which had never been a resident of, nor done business with, any nation at war with the United States since 6th April, 1917, or ally of such nation, was neither an enemy nor the ally of an enemy, within the American Trading with the Enemy Act, 1917. McReynolds, J., referring to the *Damler Case*, speaks of the "disregard of corporate entity and efforts to fix the status of corporations as enemy or not according to the nationality of stockholders."

And in *Hamburg-American Line Terminal & Navigation Co. v. United States*<sup>5</sup> the Supreme Court held that property owned by an American corporation was not enemy property even though all the stock was owned by the German corporation in Hamburg. Congress, said McReynolds, J., "definitely adopted the policy of disregarding stock ownership as a test of enemy character and permitted property of domestic corporations to be dealt with as non-enemy."

In an article upon *The Nationality of Corporations*, the learned authors show how "the problem of ostensibly domestic companies, the real control of which was in foreign lands," was solved in belligerent countries during the last war.<sup>6</sup> The

<sup>1</sup> (1892), 145 U.S., at 449, 450

<sup>2</sup> Cited *ib.*, 450, *Railroad Co v. Koontz*, 104 U.S. 5, 11, 12

<sup>3</sup> Cited *ib.*, 452; *Ex parte Schollenberger*, 96 U.S. 369, 377.

<sup>4</sup> (1924), 266 U.S. 457, 472.

<sup>5</sup> (1928), 277 U.S. 138, 140. In *Toa Kogyo Corporation v. Offenberger*, N.Y.L.J., 14th February, 1942, p. 687 (cited by Domke, 132), a domestic corporation, whose stockholders were non-resident Japanese and whose manager was a resident Japanese, was held not to be an enemy. And in *H. P. Drewry S. A. R. L. v. Onassis*, N.Y.L.J., 17th November, 1942, p. 1496; affirmed 19th December, 1942, p. 1975 (Domke, 1337), a French corporation was treated as an enemy although the main stockholder was a British subject who had fled to England.

<sup>6</sup> By R. E. L. Vaughan Williams and Mathew Chrussach (1933), 49 L.Q.R. 334-348, 337, 339, 342.

*Daimler Case* did not impute enemy nationality but *only enemy character* to the company; from the actual residence of those in control the "notional" residence of the company was inferred. The United States, however, deliberately refused to adopt this test. The authors criticise, however, the "control" theory of *nationality* as impossible to reconcile with the separate legal entity of a corporation.

*Nationality* and *domicil* being irrelevant for the purpose of enemy character, it is unnecessary to consider the various theories of a company's nationality,<sup>1</sup> or of its domicil.<sup>2</sup> One dictum only may be quoted, from a judgment of Holmes, J.: He describes *domicil* as "the one technically pre-eminent headquarters which, as a result either of fact or fiction, every person is compelled to have in order that by aid of it certain rights and duties which have been attached to it by the law may be determined." He continues: "It is settled that a corporation has its domicil in the jurisdiction of the State which created it, and as a consequence it has not a domicil anywhere else."<sup>3</sup>

During the present war the ultimate determination of enemy character is vested, in the United States, in the Secretary of the Treasury, whose decision is administrative, not judicial.

"The Secretary of the Treasury shall have full power to determine that any person is or shall be deemed to be a 'national' . . . and the foreign country of which such person is or shall be deemed to be a national . . . the term 'national' shall also include any other person who is determined by the

<sup>1</sup> 49 L.Q.R. 345, 347. See Farnsworth, 70-73, Appendix III, 298-312; Schuster, *op. cit.*, 59-68, 79; Cheshire, *op. cit.*, 197; E. Hilton Young, *The Nationality of a Juristic Person* (1908), 22 Harv. L. Rev., 1-24.

<sup>2</sup> See Farnsworth, 201-275, 212, for domicil as determined *once for all* by the law of its incorporation, 230-234: "its sole and permanent domicil," 273-275—the most convincing theory. For other theories, see 22 Harv. L. Rev., 16 *et seq.*, the "centre of administrative business"; Schuster, *op. cit.*, 68-71, 79, "the place of its administrative centre" where the directors habitually meet; Dicey, *Conflict of Laws*, Rule 19, "the place considered by law to be the centre of its affairs"; Cheshire, *op. cit.*, 198, the place of "the central control and management," as opposed to "residence," i.e., every country in which "any substantial business was transacted." But see Farnsworth, 188-195.

And see *A.-G. v. Jewish Colonisation Association* [1900] 2 Q.B. 556, 572, 575; [1901] 1 K.B. 123, 129, 130; and see Farnsworth's examination of the case, 235-241.

<sup>3</sup> *Bergner & E. B. Co. v. Dreyfus*. 172 Mass. 154. 157; (1898), 70 Am. State Rep. 251, cited by Farnsworth, 271.

This view was followed by Macnaghten, J., in *Gasque v. Inland Revenue Commissioners* [1940] 2 K.B. 80, 84, 85: "by analogy with a natural person the attributes of residence, domicil and nationality can be given, and are, I think, given by the law of England to a body corporate." A company has an English domicil if registered in England: "The domicil of origin, or the domicil of birth, using with respect to a company a familiar metaphor, clings to it throughout its existence." The opinion of Holmes, J., in *The Bergner Case* had been cited:

"Any opinion of that very eminent judge," observed Macnaghten, J., "more particularly on any question relating to the common law of England, is entitled to the highest respect in any English court."

Secretary of the Treasury to be, or to have been, since such effective date, acting or purporting to act directly or indirectly for the benefit of or under the direction of a foreign country designated in this Order or national thereof, . . .”<sup>1</sup>

Moreover, the Executive Order, establishing the office of Alien Property Custodian,<sup>2</sup> after stating that the term “national” shall have the meaning prescribed in s. 5 of Executive Order No. 8389, as amended, provides that—

“persons not within designated enemy countries<sup>3</sup> (even though they may be within enemy-occupied countries or areas) shall not be deemed to be nationals of a designated enemy country unless the Alien Property Custodian determines: (i) that such person is controlled by or acting for or on behalf of (including cloaks for) a designated enemy country or a person within such country; or (ii) that such person is a citizen or subject of a designated enemy country within an enemy-occupied country or area; or (iii) that the national interest of the United States requires that such person be treated as a national of a designated enemy country. For the purpose of this Executive Order any determination by the Alien Property Custodian that any property or interest of any foreign country or national thereof is the property or interest of a designated enemy country or national thereof shall be final and conclusive as to the power of the Alien Property Custodian to exercise any of the power or authority conferred upon me by section 5 (b) of the Trading with the Enemy Act, as amended.”

<sup>1</sup> Executive Order No. 8389 (as amended) s. 5E: Domke, 432-438, at 437. By s. 5C, “the term ‘person’ means an individual, partnership, association, corporation or other organisation.”

Summarising s. 5E, “national” includes—

(i) any person who has been domiciled in, or a subject, or resident of a foreign country (defined in s. 5D) since the effective date of the Order;

(ii) any partnership, association or corporation, organised under the law of, or having, since the effective date of this Order, its principal place of business in such foreign country, or which has been controlled by, or a substantial part of the shares, securities or obligations of which, has been owned or controlled by, directly or indirectly, such foreign country and/or one or more of its nationals;

(iii) any person, so far as he is, or has been, since the effective date, acting or purporting to act directly or indirectly for the benefit of or on behalf of any national of such foreign country; and

(iv) “any other person who there is reasonable cause to believe is a ‘national’ as herein defined.”

<sup>2</sup> Executive Order No. 9193 (6th July, 1942), s. 10 (a); Domke, 462, 463.

<sup>3</sup> Defined as “any foreign country against which the United States has declared the existence of a state of war (Germany, Italy, Japan, Bulgaria, Hungary, and Roumania) and any other country with which the United States is at war in the future” (s. 10 (a)).



## CHAPTER IV

### PROCEDURAL CAPACITY OF ALIEN ENEMY

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#### I. GENERAL RULE: NO RIGHT TO SUE

“THE best modern account of the position of the alien enemy at common law is contained in Lord Sumner's dissenting judgment in *Rodriguez v. Speyer Bros.*”<sup>1</sup> Thus, Sir William

<sup>1</sup> [1919] A.C. 59, 108-133.

## PROCEDURAL CAPACITY OF ALIEN ENEMY

Holdsworth<sup>1</sup>; Lord Wright adopts the dictum.<sup>2</sup> The speech of Lord Sumner, for profound erudition and clarity of argument, for sustained vigour and a massive irony is among the classical judgments of that great judge, pre-eminent.

" . . . if this alien becomes an enemy . . . then he is utterly disabled to maintain an action."<sup>3</sup> This rule, laid down by Coke, has been treated by mediæval and modern writers as "an unqualified rule of personal disability": another rule "so little qualified over so many centuries" would be difficult to find.<sup>4</sup> "As certain as language could make it, as curt as the Commandments. It has never been doubted . . . It has always been a rule of personal disability."<sup>4</sup> Concerning contracts with alien enemies, two separate principles are fundamental. One forbids certain contracts with an enemy; "the other limits or, as I think, denies the capacity of an enemy, not enjoying the King's protection, to enter the courts as a suitor."<sup>5</sup> The rule against trading with the enemy is rested on "public policy," i.e., to guard against a public mischief, but, as far as the courts are concerned, is now absolute. The enemy's inability to sue is not confined to contract or to trade; he could not sue in tort or on any contract except when under protection: "personal disability is the gist of it, applied without consideration of the effects."<sup>6</sup>

Nor is the rule exposed to the effect of change in public opinion, or "public policy."

"I have never heard of a legal disability," Lord Sumner said, "from which a party or a transaction could be relieved, because it would be good policy to do so . . . No court could allow a departure from the rule which forbids trading with the enemy, let public opinion change as it will. To do so would be to trench on the domain of the executive in advising on the exercise of the King's prerogative . . . Where a statute forbids a thing to be done by contract the grounds of the prohibition are irrelevant. I do not see that they become more relevant where the prohibition is imposed by an established rule of law . . . so well settled is the rule against enemy suitors, be its historic origin or its judicial foundation what they may, that any attempt to apply it anew on some idea of adapting it to the convenience of a particular case is an attempt to exercise a dispensing power."<sup>7</sup>

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<sup>1</sup> History of English Law, vol. IX, 98, Note (5).

<sup>2</sup> In *The Soufracht Case* [1943] A.C. 203, 232.

<sup>3</sup> *Calvin's Case* (1608), 7 Rep. 17a.

<sup>4</sup> [1919] A.C., at 117.

<sup>5</sup> *Ib.*, 122.

<sup>6</sup> *Ib.*, 123.

<sup>7</sup> *Ib.*, 125, 126. Upon suit by an enemy, see 130, 131. *Infra*, 154, 155.

Lord Atkinson, with eloquent reasoning, exhibits the supremacy of law over the views of a judicial tribunal acting on its own notions of "public policy."<sup>1</sup> He cites the grounds of the rule from a judgment of Buckley, L.J. :—

"The proposition that an alien enemy cannot sue rests, I conceive, upon the proposition that such an one cannot approach the King, has no resort to the King, and cannot invoke the assistance of the King. The court is the King's court. The alien enemy cannot come into that court or have the assistance of that court because the court is for judicial purposes the King sitting in his court and the alien enemy cannot approach him."<sup>2</sup>

Lord Sumner and Lord Atkinson were in the minority; the majority held that for the purpose of winding up a partnership dissolved on the outbreak of war, an alien enemy may be joined as co-plaintiff. The rule, said Lord Finlay, L.C., was founded on public policy.<sup>3</sup> Thus, also, Viscount Haldane.<sup>4</sup> But this case must be limited to its special facts.

"The character of alien enemy carries with it a disability to sue, or to sustain in the language of the civilians a *persona standi in iudicio*. The peculiar law of our own country applies this principle with great rigour."<sup>5</sup>

The rule, Lord Wright has recently declared, is not a rule of public policy which could be "moulded by the court to suit the facts of the particular case, and can be rejected if the instance discloses to the judge no mischief from the point of view of public policy as understood by the judge."<sup>6</sup>

<sup>1</sup> [1919] A.C., 87-107, at 90, 91.

<sup>2</sup> *Continental Tyre & Rubber Co. v. Davmler Co.* [1915] 1 K.B. 893, 918.

<sup>3</sup> *Rodriguez v. Speyer* [1919] A.C., at 66. Upon "public policy," see Winfield, *Public Policy in the English Common Law* (1928), 42 Harv. L. Rev. 76-102, at 98-99. See also Winfield's *Note on Public Policy in Pollock on Contracts* (1942), 11th ed., 296-7. It is there defined as:—

"a principle of judicial legislation or interpretation founded on the current needs of the community" (*ib.*, at 296).

He notices two limits on the application of public policy: "First, arguments based upon it are irrelevant where they relate to a rule of the common law that is already clearly settled. Secondly, public policy is emphatically not an ideal standard to which the law ought to conform" (*ib.*, at 297).

Upon which Lord Wright pertinently asks whether Professor Winfield had considered the course taken by the majority in *Rodriguez v. Speyer*: "Lords Atkinson and Sumner, dissenting, conclusively showed that the inability of an alien enemy to sue in an English court was a rule of the common law which had been settled for centuries" (*Pollock on Contracts* (1943), 59 L.Q.R. 122-128 at 125).

<sup>4</sup> *Ib.*, 77.

<sup>5</sup> *The Hoop* (1799), 1 C. Rob. 196, 200, *per* Lord Stowell.

<sup>6</sup> In *The Sonfracht Case* [1943] A.C. 232, 233, 234. See McNair, 44, 45, 203.

The *locus classicus* upon the procedural capacity of an enemy, whether as plaintiff or defendant or appellant, is the judgment of Lord Reading, C.J., in *Porter v. Freudenberg*.<sup>1</sup>

Alien friends have always been treated as if they were British subjects, entitled to all the personal rights of a citizen, including the right to sue. Alien enemies have no civil rights unless they are here under the protection and by permission of the Crown.<sup>2</sup> An alien enemy, subject to royal licence, cannot maintain a real or personal action until both nations are at peace.<sup>3</sup>

"If an alien enemy comes here *sub salvo conductu* he may maintain an action; so if an alien *ami* comes here in time of peace *per licentiam domini regis*, as the French Protestants did, and lives here *sub protectione*, and a war afterwards happens between the two nations, he may maintain an action, for suing is but a consequential right of protection; and therefore an alien enemy, who is here in peace under protection, may sue a bond; *aliter* of one commorant in his own country."<sup>4</sup>

Thus an enemy subject, resident in the United Kingdom, who has duly complied with the provisions of the Aliens Restriction Acts, 1914-1919, and of the Aliens Order, 1920 (as amended), and has duly registered under art. 6A of that order, is entitled to sue in the English courts and to continue proceedings pending upon the outbreak of war:—

"Such an alien is resident here by tacit permission of the Crown. He has by registration informed the executive of his presence in this country, and has been allowed thereafter to remain here. He is '*sub protectione domini regis*'."<sup>5</sup>

### 1. Proceedings Pending at Outbreak of War

If the plaintiff, at the time of action brought, is an alien friend, and before judgment becomes an alien enemy, the action cannot proceed: *Le Bret v. Papillon*.<sup>6</sup>

The action was in *assumpsit* upon a judgment recovered by the plaintiff against the defendant in Rouen. The defendant pleaded *in bar* that the plaintiff was living in France with which England was then at war. By his replication the plaintiff alleged that when he exhibited his bill, France was at peace. Strictly, said Lord Ellenborough, no matter of defence arising

<sup>1</sup> [1915] 1 K.B. 857, 866-892, at 869, 870, 873.

<sup>2</sup> *Ib.*, 869, citing Blackstone, 21st ed., vol. 1, c. 10, p. 372.

<sup>3</sup> *Ib.*, 870, citing Coke upon Littleton, 19th ed., vol. 1, p. 129 (a).

See Note, "*Aliens—Disability of Enemy Alien to Convey Marketable Title*," (1943), 43 Colum. L. Rev. 255, 256.

<sup>4</sup> *Ib.*, 870, 871, cited from Bacon's Abridgment (7th ed., vol. 1, p. 183), which is based upon *Wells v. Williams* (1697), 1 Ld. Raym. 282; 1 Salk. 46, and *Sylvester's Case*, 7 Mod. 150; and see *McNair*, 403 *et seq.*

<sup>5</sup> *Ib.*, 874, approving *Thurn and Taxis (Princess) v. Moffit* [1915] 1 Ch. 58, 61,

<sup>6</sup> (1804), 4 East 502, 507, 509.

out of action brought can properly be pleaded in bar, but the court must give "such judgment on the whole record as ought to be given without regard to the issues found, or to any imperfection in the prayer of judgment made on either side." The plea of alien enemy should have been made *in abatement*, but even though wrongly pleaded, the court took notice of the incapacity and held that the plaintiff "be barred from further having and maintaining his action."<sup>1</sup>

In *Alcinous v. Nigreu*<sup>2</sup> (action for work and labour), the defendant pleaded that since proceedings were instituted, the plaintiff, being Russian, had become an alien enemy.

"The contract, having been entered into before the commencement of hostilities, is valid, and, when peace is restored, the plaintiff may enforce it in our courts. But, by the law of England, so long as hostilities prevail, he cannot sue here."

Nor does the fact that the pleadings were closed before the war enable the proceedings to be continued during the war.<sup>3</sup>

Thus, in *Van Uden v. Burrell*,<sup>4</sup> a Dutch firm of shipowners at Rotterdam, the sole partners in which were interested in a business carried on in Germany, who had brought an action before the war, were held to be alien enemies, and the action was *sisted* until the end of the war.

## 2. No Waiver of Plea of Alien Enemy

The defendant cannot confer jurisdiction upon the court by waiving the plea of alien enemy.

True, that in *The Janson Case*<sup>5</sup> it was agreed between the parties that no dilatory plea should be set up based upon the fact that the plaintiff company was an alien enemy and could not sue while the war lasted. Mathew, J., allowed the case to be dealt with as if the war were over.<sup>6</sup> Lord Davey doubted whether it was "competent" for the parties to take this course :

<sup>1</sup> (1804), 4 East 510. See *per* Lord Sumner in *Rodriguez v. Speyer* [1919] A.C. 109, and *per* Lord Wright in *The Sovracht Case* [1943] A.C. 232, 234, and *Bullen & Leake* (1868), 3rd ed., 475.

<sup>2</sup> (1854), 4 El & Bl. 217, 219, *per* Lord Campbell, C.J.

<sup>3</sup> *Von Hellfeld v. Rehnitz* (1914), *The Times*, 11th December; cited by McNair, 47; see [1914] 1 Ch. 748.

<sup>4</sup> [1916] S.C. 391, 394, *per* Lord President. Cited with approval by Viscount Simon, L.C., in *The Sovracht Case* [1943] A.C. 210, 211.

<sup>5</sup> [1902] A.C. 484.

<sup>6</sup> [1900] 2 Q.B. 339, 343. In *Casseres v. Bell* (1799), 8 Term Rep. 166, Kenyon, C.J., described the plea of alien enemy as "an odious plea." See *Harman v. Kingston* (1811), 3 Camp. 150, 152, where Lord Ellenborough stated that, under the old practice, the plea of alien enemy should have been pleaded *in abatement*. And see *per* Lord Wright in *The Sovracht Case* [1943] A.C. 234.

"The objection being one based on considerations of public policy affecting the sovereign, the courts should be held bound to take notice of the plaintiff's inability to sue."<sup>1</sup>

Lord Sumner declared, in *Rodriguez v. Speyer*, that such an agreement "should not have been tolerated"

"At any rate," he continued, "what then took place is no authority for saying that a court can only take notice of the plaintiff's incapacity when the defendant pleads it, and I think that no question of pleading or practice can now obscure the court's duty to enforce this rule when once its nature and limits have been ascertained."<sup>2</sup>

Thus, it is submitted, is the law

### 3 *Stay of Proceedings, or Dismissal of Action*

If the plaintiff becomes an alien enemy after the writ, the court may take one of two courses. The defendant may *apply to have the proceedings stayed* until after the war, or, if the action comes on for trial, it may be *dismissed*, the plaintiff having the right to begin again after the war.<sup>3</sup>

"A person cannot appear in the King's courts to sue so long as he is an alien enemy, but when he ceases to be an alien enemy his right to sue revives."<sup>4</sup>

In *Von Helffeld v. Rechnitzer*, Sargant, J., dismissed the action. Since the outbreak of war plaintiff had gone to Amsterdam; his right to bring an action after the war was over, was preserved.

In *Porter v. Freudenberg*, Lord Reading, C.J., referred to the alien enemy's right to sue, as "suspended during the progress of hostilities and until after peace is restored."<sup>5</sup> Similarly, in *Bullen and Leake*. "The defendant should, it seems, apply for a stay of proceedings."<sup>6</sup>

<sup>1</sup> [1902] A.C., at 499. The observations of Lord Lindley to the contrary (at 509) are, it is submitted, incorrect.

<sup>2</sup> [1919] A.C., at 111. And see, for the rationale of the general rule, the observation of Buckley, L.J., in *Continental Tyre & Rubber Co. v. Daimler Co.* [1915] 1 K.B. 918. This dictum was cited and followed by the Court of Session in *Van Uden v. Burrell* [1916] S.C. 391, 394.

<sup>3</sup> See the notes to *Clementson v. Blessig* (1855), 11 Ex. 135, 141-145, at 145.

<sup>4</sup> *Per* Tomlin, J., in *Wilderman v. F. W. Berk & Co.* [1925] Ch. 116, 123.

<sup>5</sup> [1915] 1 K.B., at 880.

<sup>6</sup> At 594, 595. See also *The Annual Practice* (1944), 2405, 2408. The practice in the Federal Courts is to stay the action—see cases cited in (1917), 31 Harv. L. Rev., 471-475, 495.

A stay has been granted on the motion of the defendant where the plaintiff was the assignee of a non resident alien enemy and the assignment was made for the purpose of the suit *Fileccia v. Propats*, New Jersey Supreme Court, 28th May, 1942 (cited by Domke, 217). Domke also refers to *Reithardt v. Herzfeld*, 179 App. Div. 865, 868 (New York Supreme Court), where the plaintiffs, residing in Germany, had assigned their cause of action to American lawyers as trustees for the benefit of the plaintiff's creditors, among whom were New York banks (ib., also 228, 29). He contrasts *Wiener v. Central Fund for German Jewry* (1941) 2 All E.R. 29, *infra*, 217.

In *Candilis v. Victor & Co*,<sup>1</sup> where two out of three partners, becoming alien enemies, were resident in an enemy country, the Court of Appeal ordered proceedings to be stayed. Swinfen Eady, L.J., said :—

“When the facts were not in dispute and it was clear that some of the plaintiffs were alien enemies, the action ought not to be allowed to proceed.”<sup>2</sup>

In *Orenstein & Koppel v. Egyptian Phosphate Company, Ltd.*,<sup>3</sup> a German company, having a London office, sued a firm in Glasgow upon a contract made through the London manager. Decree being granted in favour of the defenders, the company appealed. While the case was pending, war was declared. The Court of Session held that since all payment of money to or for the benefit of an enemy was, by royal proclamation, prohibited, no effective decree could be pronounced and process was *sisted*.

On the other hand, the Court of Appeal (reversing Simonds, J.), in *Eichengruen v. Mond*,<sup>4</sup> ordered a statement of claim by an alien enemy to be struck out as disclosing no cause of action and *dismissed* the action as frivolous and vexatious.

The writ was issued in 1938 by a German living in Berlin : his solicitors remained on the record. The statement of claim delivered in January, 1939, related to events which occurred in 1915. The plaintiff (an alien enemy during the last war), together with the first and second defendants, were original shareholders in the defendant company. In 1915 the company increased its capital, allotting part of the increase to several of the

<sup>1</sup> (1916), 33 T.L.R. 20, 21.

<sup>2</sup> (1) For the recovery of debts after the war of 1914 due by a national of one contracting power to a national of an opposing power and payable before the war, see Picciotto and Wort, *The Treaty of Peace with Germany* (1919). The machinery was the Clearing Office (Treaty of Versailles, 1919, section III, art. 296, and Annex) and the Mixed Arbitral Tribunals (section VI, art. 304; Annex and art. 305). The excellent Introduction (i-xviii) contains a lucid survey of the settlement of pre-war obligations through an international tribunal. By section V, art. 299, all contracts, subject to the Annex, concluded between enemies were regarded as having been dissolved (subject to certain exceptions) upon the outbreak of war.

(2) For the jurisdiction and procedure of the tribunals, see *The Mixed Arbitral Tribunals*, A Reading delivered before the Middle Temple by Heber L. Hart, K.C., LL.D. (late British Member of the Mixed Arbitral Tribunals). By 1931, 382,464 British and German claims had been dealt with by the Clearing Office and £86,290,555 had been paid to British creditors and claimants against Germany in respect of 78,378 claims.

For the jurisdiction, composition and procedure of these tribunals, see *Note* (1931), 12 B.Y.I.L., 135-142; also, Paul de Auer (Budapest), *The Competency of Mixed Arbitral Tribunals* (1928), 13 *Grotius* xvii-xxx.

<sup>3</sup> [1915] S.C. 55. See the opinion of Lord Skerrington and early Scottish cases cited at 64, mentioned, with approval, by Lord Sumner in *Rodriguez v. Speyer* [1919] A.C. 59, 111-112, and by Lord Thankerton in *The Soufracht Case* [1943] A.C. 203, 216.

<sup>4</sup> [1940] Ch. 785; (1940), 3 All E.R. 148.

defendants; to the plaintiff no increase was allotted. By the present action he complained that no notice of the proposed increase had been given to him. He now claimed that the first two defendants became trustees of his proportion of the shares; against the company he claimed that the issue was void.

The first defendant served upon the solicitors a notice asking, in view of certain admissions on the pleadings (closed in August, 1939), that the statement of claim should be struck out and the action dismissed. There was no evidence of service upon the plaintiff of the notice of motion; his solicitors had been unable to communicate with him; of these proceedings he had no knowledge. Simonds, J., refused the application.

On appeal it was argued that the refusal of the application would inflict hardship upon a British subject merely because his opponent was an alien enemy. The plaintiff's solicitor on the record remained his solicitor until another was appointed; service upon him was notice to the plaintiff.<sup>1</sup>

Sir Wilfrid Greene, M.R., accepted this argument. Was the appellant to have the action "hanging over him for an indefinite period merely because the plaintiff is an enemy alien?"<sup>2</sup> There was no ground "why such a privilege should be accorded to an enemy alien and why such a disadvantage should be imposed upon a British subject. The rules have been strictly complied with and the circumstance that the plaintiff's solicitors on the record have not communicated with their client and might well have difficulties in communicating with him does not, upon the facts of this case, in my view, justify the court in withholding from the appellant the relief to which he is entitled or in postponing decision upon the application until such steps as might be possible to communicate with the plaintiff had been taken."<sup>2</sup> Here, the action, on the face of it, was "quite unsustainable."

It is submitted, with respect, that the merits of the case are irrelevant. Moreover, the fact that the alien enemy's solicitor remains on the record can no more confer jurisdiction, it is submitted, than the waiver of the plea of alien enemy; where a party becomes an alien enemy, his solicitor's retainer is abrogated.<sup>3</sup>

<sup>1</sup> See R.S.C., Ord. LXVII, r. 2, and *Note*, "Solicitor on Record," in *The Annual Practice* (1944), 1570.

<sup>2</sup> [1940] Ch. 791. See *Note*, 54 Harv. L. Rev. 350-352. "The preferable rule seems to be that the suit should not be dismissed, but that the rights of the parties should be preserved in *statu quo*, and the proceedings suspended for the duration of the war . . . Most American decisions are positive in their assertion that the action must be suspended . . . There appears to be no precedent for the court's action here in striking out the declaration when the plaintiff would not be heard" (at 351). *McNair*, 318, also doubts this decision.

<sup>3</sup> *Semble*, per Lord Porter in *The Soufracht Case* [1943] A.C. 253, 254.



#### 4. *No Order for Security for Costs*

The court will not order security for costs against an enemy plaintiff whose claim is suspended by reason of war; nor will the court order in the alternative that the enemy plaintiff be for ever barred against the defendant: *Geiringer v. Swiss Bank Corporation*.<sup>1</sup>

G, residing in New York, claimed against the Swiss Bank (who had a London office) a declaration that they held certain securities in trust for him absolutely, and an order that these, or the proceeds of sale, be transferred to him. The bank interpleaded, deposing that they held the securities for the account of a Viennese bank who had instructed the London office to sell the securities and to credit their account with the proceeds. The master ordered an issue to be tried to determine the ownership of the proceeds; the Viennese bank to be plaintiffs and G, defendant; further proceedings to be stayed until judgment in the issue. After the order, war broke out; in October the claimants delivered points of claim; G asked for security for costs, or, alternatively, that the plaintiffs in the issue be for ever barred against the defendant.

It would be "unfair," said Bennett, J., "to order security; they could not comply with it. It would equally be unfair to make the alternative order; to bar their rights against a solvent body and to substitute an individual whose financial position was unknown, resident in the United States." Bennett, J., suggested that if the master's order were so framed as to order that in the issue the plaintiff should be G, and the defendants the Viennese bank, the issue could be heard.

This suggestion, it is submitted, cannot be supported. Relief by way of interpleader may be granted where the applicant is under liability for any debt for which he "is, or expects to be, sued by two or more parties (in this order called the claimants) making adverse claims thereto."<sup>2</sup> It is true that the master may direct which of the claimants is to be plaintiff and which defendant. But the defendant in the issue is, nevertheless, a claimant—an adverse claimant, who will or may sue the applicant.<sup>3</sup> He is an *actor* in the proceedings.<sup>4</sup>

## II. ENEMY UNDER PROTECTION: RIGHT TO SUE

An alien enemy, resident in the United Kingdom, who has duly complied with the provisions of the Aliens Restriction Acts, 1914–1919, and of the Aliens Order, 1920 (as amended),

<sup>1</sup> (1940), 1 All E.R. 406, 409, 410.

<sup>2</sup> R.S.C., Ord. LVII, r. 1 (a), r. 7.

<sup>3</sup> See 18 Halsbury, *Laws of England*, 2nd ed., *tit.*, *Interpleader*, 602–604.

<sup>4</sup> *Porter v. Freudenberg* [1915] 1 K.B. 857, 884. See *infra*, 154.

and has duly registered under art. 6A of the order, is entitled to sue in the English courts or to continue proceedings already pending.

(a) In *Thurn and Taxis (Princess) v. Moffitt*,<sup>1</sup> the plaintiff, originally an American, the wife of a Hungarian who was abroad and probably fighting against this country, was resident here and had duly registered. She brought an action for damages for libel, and the defendant applied for a stay of proceedings on the ground that she was an alien enemy. Sargant, J., held that by virtue of her registration and the permission to reside thus implied, she was entitled to enforce that right, despite the existence of the war.

"The effect of such registration is to amount at least to a licence to the person to remain in this country; indeed . . . the permission really amounts to a command to the alien enemy not to depart from this country without some special leave for the purpose."

Lord Reading, C.J., approving this decision in *Porter v. Freudenberg*,<sup>2</sup> declared:—

"Such an alien is resident here by tacit permission of the Crown. He has by registration informed the executive of his presence in this country, and has been allowed thereafter to remain here. He is '*sub protectione domini regis*'."

A century earlier, Chief Justice Kent had said:—

"A lawful residence implies protection and a capacity to sue and be sued."

<sup>1</sup> [1915] 1 Ch 58, 61

<sup>2</sup> [1915] 1 K B 857, 874 *Aliter*, *semble*, if he has not registered, or made the Crown aware of his presence and obtained express or tacit permission to stay: McNair, 42, 43.

<sup>3</sup> *Clarke v. Morey* (1813), 10 Johns 69 (N Y) See Domke, chap. 16, *Suits by Enemies*, 203-235, for American authorities

*Aliter*, *semble*, if an enemy alien is not legally admitted or remains illegally. (The authorities conflict: see cases cited by Domke, 213.) Domke (at 57) cites from *United States v. Shapiro* (1942), 43 Fed. Supp 927, referring to *United States v. Goldstein*, 30 Fed. Supp. 771. It was there said—

"The term residence as used in this Act [sc. of 1917] is 'legal residence,' and anyone who enters this country illegally cannot thereby acquire a legal residence."

Thus in *Szanti v. Teryazos* (1942), 45 F. Supp. 618, a Hungarian, employed as a fireman on a Greek ship, who had overstayed his shore leave, was deemed to be a non-resident, and an "enemy." On the other hand, in *Dezsofi v. Jacoby* (1942), 178 Misc. 851, 34 N.Y.S. (2d) 672, a Hungarian, who had illegally entered the United States, was permitted to sue in the courts of New York State for services rendered after his entry into the United States. The 14th Amendment to the Constitution provides that no State shall "deny to *any* (italics of the court) person within its jurisdiction the equal protection of the laws" (cited by Domke, 57-58). He observes that "temporarily admitted aliens or visitors may claim to be residents" (at 59).

(b) *Wells v. Williams*,<sup>1</sup> where an alien enemy living here *by the King's licence and under his protection* was held entitled to sue on a bond, is the "basis of the modern law on the subject."<sup>2</sup> The short judgment deserves to be cited in full:—

"If an alien enemy comes hither *sub salvo conductu*, he may maintain an action; if an alien *amy* comes hither in time of peace, *per licentiam domini regis*, as the French Protestants did, and lives here *sub protectione*, and a war afterwards begins between the two nations, he may maintain an action; for suing is but a consequential right of protection; and therefore an alien enemy, that is here in peace under protection, may sue a bond; *aliter* of one commorant in his own country."

The principle applies to refugees from enemy territory or territory under enemy occupation who are here under the King's protection.

The plea of "Alien Enemy," in the 3rd edition (1868) of Bullen and Leake<sup>3</sup> (cited by Atkin, J., in *Continho Caro & Co. v. Vermont & Co.*)<sup>4</sup> runs thus:—

"That at the commencement of this suit the plaintiff was and is an alien born (that is to say) born in the empire of — of alien father and alien mother, and was not nor is a subject of our lady the Queen by naturalization, denization or otherwise, and was and is an enemy of our lady the Queen, *and residing in this kingdom without the licence, safe-conduct, or permission of our said lady the Queen.*"

<sup>1</sup> (1697), 1 Salk. 46; 1 Ld. Raym. 282, 283. The summary in Salkeld is the more correct: *per* Younger, J., and *per* Lord Cozens-Hardy, M.R., in *Schaffertius v. Goldberg* [1916] 1 K.B. 284, 294, 300. The statement in Lord Raymond is as follows:—

"Though the plaintiff came here since the war, yet if he has continued here by the King's leave and protection ever since, *without molesting the government or being molested by it*, he may be allowed to sue, for that is consequent to his being in protection."

This qualification is not found in the report in Salkeld or in Bacon's Abridgment.

"Either it (*sc.* the observation in Lord Raymond's report) must be wrong, or else 'molesting' refers to the revocation by the Crown under its prerogative of the licence to remain in this country": [1916] 1 K.B., at p. 300, *per* Lord Cozens-Hardy, M.R.

<sup>2</sup> [1916] 1 K.B. 284, 292, *per* Younger, J. See also *per* Black, J., delivering the opinion of the Supreme Court of the United States, in *Ex parte Kumezo Kawato* (1942), 317 U.S. 69, *infra*, 143, 144.

<sup>3</sup> *Precedents of Pleading*, 475; see cases cited in note (a); 9th ed. (1935), 594; and, for a precedent of the old "dilatatory plea," Sutton, *Personal Actions at Common Law* (1929), 153. The plea of alien enemy could also be pleaded *in bar*, i.e., where the defence of alien enemy went to the contract itself, e.g., that, upon the outbreak of war, the contract was abrogated: see *per* Lord Ellenborough, C.J., in *Flindt v. Waters* (1812), 12 East 260, 265. See also the judgment of Rowlatt, J., in *Schmitz v. Van der Veen & Co.* (1915), 84 L.J.K.B. 861, 864. *Infra*, 216, 217.

<sup>4</sup> [1917] 2 K.B. 587, 592; author's italics.

An alien enemy, domiciled in England, who has duly registered as an alien, even though he is subsequently interned, is entitled to institute *proceedings under the Matrimonial Causes Acts*.<sup>1</sup>

(c) During the present war, the principle has been re-examined by the Supreme Court of the United States in *Ex parte Kawato*.<sup>2</sup>

K, born in Japan, became in 1905 a resident of the United States. In 1941, he claimed wages due as a seaman, and sought an allowance for maintenance in the District Court of California, alleging that in the performance of his duties he had sustained injuries. The owners of the vessel appeared, and in January, 1942, they moved to abate the action on the ground that the petitioner, now become an enemy alien, had no right to sue during the war between the United States and Japan. The petitioner was subsequently interned, but this circumstance the Government did not consider altered his procedural status.

Black, J. (delivering the opinion of the court), referred to the original common law rule as stated by Littleton, barring all aliens from the courts, its modification by Coke, barring alien enemies only, and the relaxation in *Wells v. Williams, supra*, that alien enemies under licence from the Crown might proceed in the courts: "this modern, humane principle has been applied even when the alien was interned" (*infra*). The original common law rule, he continued, was "from the beginning objectionable" in the United States. "Harshness towards immigrants was inconsistent with that national knowledge . . . of the contributions made in peace and war by the millions of immigrants who have learned to love the country of their adoption more than the country of their birth." In *Clarke v. Morey*, Chief Justice Kent had declared that "the licence is implied by law and the usage of nations."<sup>3</sup> Only

<sup>1</sup> *Krauss v. Krauss* (1919), 35 T.L.R. 637. See also *Weiss v. Weiss* (1940), S.L.T., 147, where the pursuer, however, was not interned.

<sup>2</sup> (1942), 317 U.S. 69, *A.J.I.L.*, vol. 57 (1943), 336-341. Domke, App. U., 533-538. See Domke, chap. 15, *Suits by Enemies*, 203-235.

In *Bernheimer v. Vurpillot* (1942), 42 F. Supp. 830, B, a German refugee resident in Pennsylvania, sued for damages for negligence. The court struck out the action on the ground that the Presidential Proclamation, No. 2526 (8th December, 1941), did not include a clause similar to that in the Presidential Proclamation of 6th April, 1917, which permitted enemy aliens conducting themselves in accordance with the law to remain "undisturbed in the peaceful pursuit of their lives" (Domke, 207). The decision was criticised in (1942), 55 Harv. L. Rev., 1057, 1058, and has been reversed, and is not the law.

Contrast *Kaufman v. Eisenberg* (1942), 177 Misc. 939, 32 N.Y.S. (2d), 450, where the trial judge, correcting himself, said that until the Legislature or the President withdrew the right of a resident alien enemy to sue, the court must recognise and enforce that right (Domke, 204, 208).

Domke (211) cites a New Zealand decision, *Paul Arnerich v. R.* (1942), N.Z.L.R. 380, where a resident alien enemy was entitled to petition the King under the Crown Suits Act, 1908, for damages incurred as an employee of the Public Works Department.

<sup>3</sup> (1813), 10 John. 69, 72.

the Government has the power to prevent a resident alien enemy from receiving his compensation or wages. Even if the petitioner were a non-resident enemy alien, continued Black, J., it might be more appropriate to release his claim to the Alien Property Custodian rather than to the owners.<sup>1</sup> "The ancient rule against suits by resident alien enemies has survived only so far as necessary to prevent use of the courts to accomplish a purpose which might hamper our own war efforts or give aid to the enemy. This may be taken as the sound principle of the common law to-day."

Nor was the petitioner barred from the courts by the United States Trading with the Enemy Act, which was never intended, without Presidential proclamation, to affect resident aliens. The President has not used his authority to exclude resident aliens from the courts; the administration had adopted "precisely the opposite program."

"The doors of our courts," Black, J., concluded magisterially, "have not been shut to peaceable law-abiding aliens to enforce rights growing out of legal occupations. Let the writ issue."

(d) *A spy is not under the King's Peace*: he is guilty of "unlawful belligerency," and is not entitled to the privileges of a prisoner of war. Thus the Supreme Court held in the *Case of the Saboteurs, ex parte Quirin*.<sup>2</sup>

Eight Germans, after living in the United States, and returning to Germany between 1933 and 1941, landed from German submarines on Long Island and on Florida in June, 1942. They had been training in a school for sabotage, wore German uniforms which, on landing, they buried, and carried explosives. Placed on trial before a military commission, they were not entitled, it was held, to *habeas corpus* or to be tried by the ordinary courts.

Stone, C.J., declared :—

"The spy who secretly and without uniform passes the military lines of a belligerent in time of war seeking to gather military information and communicate it to the enemy, or an enemy combatant, who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals."<sup>3</sup>

<sup>1</sup> Quoting *Birge-Forbes Co. v. Heye*, 251 U.S. 317, 323, that the sole objection to giving judgment for an alien enemy "goes only so far as it would give aid and comfort to the other side." This, however, is not the law of England.

<sup>2</sup> (1942), 317 U.S. 1, 63 S. Ct. 2. The opinion of Stone, C.J., is given in *A.J.I.L.*, vol. 37 (1943), 152-164. Domke, 116-118.

<sup>3</sup> 317 U.S., at 31.

Citizens who associate themselves with "the military arm of the enemy government" and under its auspices enter the United States are "enemy belligerents."<sup>1</sup>

### 1. *Effect of Internment or Detention.*

(a) An alien enemy, duly registered, who is interned purely as a matter of general policy, *without suspicion of hostile attitude or proof of hostile intent*, has the same right to sue as any other person under the King's allegiance: *Schaffenius v. Goldberg*.<sup>2</sup>

S, born in Germany, for over twenty years had lived and carried on business in England. Upon the outbreak of war, he duly registered as an alien and continued his business. In 1915 he was interned. His manager, who held a power of attorney, sued the defendant for advances under an agreement against goods to be manufactured. The plaintiff could have his action, Younger, J., held: entitled to make the agreement, he must be entitled to enforce it. Internment, though it restricts his opportunities, did not affect his rights: it did not make him an enemy. Registration as an alien enemy is evidence of the King's licence and protection—"protection" meaning little more than the consequence of a licence to remain. Internment does not operate as a revocation of the licence to remain.

"Can it be," asked Warrington, L.J., "that a licence to remain in this country is recalled by an act of the Crown which compels him to remain in this country? . . . Notwithstanding the internment, the licence to remain in the country, which carries with it the right to prosecute an action in the courts of this country, must remain in force."<sup>3</sup>

(b) An alien enemy who is interned is not entitled to a writ of *habeas corpus*: *Ex parte Liebman*.<sup>4</sup>

L was informed that he was about to be interned "as a prisoner of war." Born in Germany, since 1889 he had lived in England. Obtaining in 1890 a formal discharge from German nationality, he had not become naturalised as a British subject.

<sup>1</sup> 317. U.S., at 37, 38.

<sup>2</sup> [1916] 1 K.B. 284, 289, 292, 293, 295. The right to sue is consequential on the right to protection: 1 Bacon's Abridgment (1832 ed.), 183, *tit. Aliens*.

<sup>3</sup> [1916] 1 K.B., at 304. See *per* Goddard, L.J., in *In re an Arbitration* [1943] 1 K.B. 222, 233. And see (o. Litt. 1, 129*b*, cited by Younger, J., in [1916] 1 K.B. 290, 291. In *Crolla v. Connolly* [1942] S.C. 21, 24, the Court of Session held that a British detainee was entitled to be deemed executor-dative *qua* next-of-kin to his father. The Lord Justice-Clerk observed that the appellant, although detained by administrative action, had not lost his civil rights. In *Schulze v. Jamieson* [1917] S.C. 400, 403, *per* Lord Guthrie, an alien enemy resident in Scotland and duly registered, was appointed executor.

<sup>4</sup> [1916] 1 K.B. 268, 275. See for a criticism, McNair, 59, 60.

For American cases, see Domke, 107-109. The determination that an alien be held in custody is not subject to judicial review. But an alien so held in custody is entitled to a judicial determination of his claim to citizenship.

In 1914 he registered as an "alien enemy." Having applied to the Home Office Advisory Committee for exemption, but without success, he asked for a writ of *habeas corpus*.

The Crown contended, on the authority of *The Three Spanish Sailors*,<sup>1</sup> that the court has no jurisdiction to grant the writ on the application of a prisoner of war. In that case three Spanish seamen who had fought against England were taken prisoners on a Spanish privateer. The court refused to release them, saying: "These men . . . are alien enemies and prisoners of war and therefore not entitled to any of the privileges of Englishmen; much less to be set at liberty on a *habeas corpus*." No distinction could be drawn between an alien enemy who was captured and one who was interned. The Crown, by virtue of the prerogative, has the right to intern an alien in time of war.

L, it was held, had not become entirely divested of the rights belonging to a natural-born German: in a privileged position he could recover full German nationality and was therefore an alien enemy. Was he a prisoner of war? The words of Bailhache, J., have a prophetic ring: "This war is not being carried on by naval and military forces only. Reports, rumours, intrigues play a large part. Methods of communication with the enemy have been entirely altered . . . a German civilian in this country may be a danger in promoting unrest, suspicion . . . in communicating intelligence . . . a far greater danger, indeed than a German soldier or sailor."<sup>2</sup> He continued:—

" . . . a German subject resident in the United Kingdom, who in the opinion of the executive Government is a person hostile to the welfare of this country and is on that account interned, may properly be described as a prisoner of war, although not a combatant or a spy."<sup>2</sup>

That no writ of *habeas corpus* will be granted to a prisoner of war is settled law. These observations did not apply to British subjects or neutrals.<sup>3</sup> "To show that a man is a prisoner of war," observed Low, J., "it is not necessary for him to have been an actual combatant."<sup>4</sup> The licence to remain, he thought, might at any time be terminated by the Crown: notice of internment was a sufficient revocation.<sup>5</sup> *Sed quære*.

<sup>1</sup> (1799), 2 W. Bl. 1324.

<sup>2</sup> [1916] 1 K.B., at 275. But see the criticism of Lord Cozens-Hardy, M.R., in *Schaffgenius v. Goldberg* [1916] 1 K.B., at 301.

In *Ex parte Sullivan* (1941), 1 D.L.R. 676, a person detained was regarded as a prisoner of war.

On the other hand, in *Ex parte Kumezo Kawato* (1942), 63 S. Ct. 115 (*supra*), in the absence of a proclamation by the President, an interned individual of enemy nationality was not considered as an enemy.

<sup>3</sup> [1916], 1 K.B., at 276

<sup>4</sup> *Ib.*, 277.

<sup>5</sup> *Ib.*, 279.

(c) It has been submitted that a person who is interned because he is *suspected of hostile attitude* has forfeited protection: he has either "molested the Government," or is "being molested by it." Such a person probably may not be entitled to sue in the King's courts.<sup>1</sup>

The Crown is entitled, *under the prerogative*, to intern an *alien enemy* as a prisoner of war, whether he has registered as an alien, or not, and even if, on the recommendation of an advisory committee, he has been provisionally exempted from internment: *R. v. Knockaloe Camp (Commandant), ex parte Forman*.<sup>2</sup> The powers under the prerogative of the Crown over aliens are expressly saved.<sup>3</sup>

Moreover, under the Defence (General) Regulations, 1939, any person whom the Secretary of State "has reasonable cause to believe" to be "of hostile origin or associations," or "to have been recently concerned in acts prejudicial to the public safety or the defence of the realm," or in preparing or instigating such acts, may be *detained* if the Home Secretary thinks that by reason of those facts it is "necessary to exercise control over him."<sup>4</sup> A "detention order" may also be made against a person whom the Secretary of State "has reasonable cause to believe" to have been, or to be, a member of or to have been, or to be, "active in the furtherance of the objects of," certain organisations, *and that it is necessary to exercise control over him*.<sup>5</sup> Finally, such an order may be made against any person whom the Secretary of State has "reasonable cause to believe," if his recent conduct in an area to which the paragraph applies, or any words recently written or spoken by him expressing sympathy with the enemy, indicates or indicate that he is likely to assist the enemy, *and that by reason of these facts it is necessary to exercise control over him*.<sup>6</sup> The person so *detained* is "deemed to be in lawful custody."<sup>7</sup> The order may at any time be suspended on conditions; this direction may be revoked if the conditions have not been observed or if the operation of the order can no longer be suspended "without detriment to the public safety

<sup>1</sup> McNair, 58.

<sup>2</sup> (1917), 117 L.T. 627, 630, 631, *per* Avory, J. See also *Ex parte Liebmann* [1916] 1 K.B. 288, *per* Bailhache, J., at 274; *per* Low, J., at 278, 279, *supra*.

<sup>3</sup> Aliens Restriction Act, 1914, s. 1 (6).

<sup>4</sup> S.R. & O., 1939, No. 927, as amended by S.R. & O., 1939, No. 1681, reg. 18B (1) See *Liversidge v. Anderson* [1942] A.C. 206, *supra*, 48-52

<sup>5</sup> Regulation 18B (1A). The Secretary of State must be *satisfied* that either (a) the organisation is "subject to foreign influence or control," or (b) that the persons in control have or have had associations with those concerned in the government of Germany, Italy, or Japan, or sympathies with that system of government, *and that there is danger of the utilisation of the organisation for prejudicial purposes*.

<sup>6</sup> Regulation 18B (1B)

<sup>7</sup> See also S.R. & O., 1940, Nos. 681, 770, 843



or the defence of the realm." A person aggrieved by an order, or by the refusal to suspend the operation of an order, or by the imposition of conditions, may make his objections to an advisory committee presided over by a chairman nominated by the Home Secretary.<sup>1</sup>

Detention is not punitive but preventive; it implies a suspicion of "hostile attitude." The regulation applies to "any person," including a British subject. Proceedings have been brought by British subjects detained under the regulation for damages for false imprisonment, for unlawful dismissal and for libel, but there is no record of any such proceeding by an enemy subject so detained.<sup>2</sup> The point remains open.

(d) A prisoner of war, while interned as such, may make a contract and may bring an action upon that contract: *Sparenburgh v. Bannatyne*.<sup>3</sup>

The plaintiff, a German, serving as a sailor in the Dutch fleet (England and Holland being at war), was captured and sent as a prisoner of war to St. Helena. There, with the consent of the commanding officer, he was put on board a British merchantman and did his duty during the voyage to England, to the satisfaction of the captain, the defendant. On arrival, he was taken into custody and sued to recover his wages.

"A prisoner of war," observed Heath, J., "is not adhering to the King's enemies, for he is here under protection from the King. If he conspires against the life of the King, it is high treason; if he is killed, it is murder; he does not therefore stand in the same situation as when in a state of actual hostility."

A prisoner of war, it had been said, could not contract: "His case would be hard indeed if that were true":

"The contract in question was made by the permission of the King's officer, and therefore by the licence of the King, under whose authority the officer may be presumed to have acted . . . If a prisoner of war can be sued, there is no reason why he should not sue."

And Rooke, J., observed:—

"An enemy under the King's protection may sue and be

<sup>1</sup> Regulation 18s(3), (5). Sir Walter Monckton, K.C., Birkett, J., and Mr. John Morris, K.C., are the chairmen nominated. Regulation 18c (which deals with prisoners of war) specifically refers, in para. (3), to detention "under this Part of these Regulations or in exercise of the prerogative of the Crown." By the Aliens Order, 1920, art. 12 (5a) (S.R. & O., 1940, No. 758), an alien may be detained instead of being deported.

For the suspension, on medical grounds, of a detention order subject to conditions, see *Debate on The Address—Sir Oswald Mosley (Release): Official Report*, vol. 395, 1st December, 1943, cols. 395-478; speech of Attorney-General, cols. 434-438; speech of Home Secretary, col. 469.

<sup>2</sup> See *Pless v. Castlereagh*, *The Times*, 18th December, 1943, an action for libel.

<sup>3</sup> (1797), 1 Bos. & P. 163, 169. McNair, 55.

sued; that cannot be doubted. A prisoner of war is, to certain purposes, under the King's protection, and there are many cases where he can maintain an action."

A lively example follows:—

"I will suppose that an officer of high rank on his parole is possessed of a ring or a jewel of great value, on which he wants to raise money, and that a tradesman is so dishonest as to receive it from him and refuse either to advance the money or return the pledge. Surely the court would say that he might recover his ring or his jewel from the tradesman."<sup>1</sup>

The Defence (General) Regulations enable the Home Secretary to prescribe conditions relating to the employment of prisoners of war in the United Kingdom while elsewhere than in places for the detention of such prisoners.<sup>2</sup>

## 2. *In the King's Peace*

Sir William Scott, in *The Hoop*, laid down this principle:—

"In the law of almost every country, the character of alien enemy carries with it a disability to sue . . . The same principle is received in our courts of the law of nations; they are so far *British* courts, that no man can sue therein who is a subject of the enemy, *unless under particular circumstances that pro hac vice discharge him from the character of the enemy; such as his coming under a flag of truce, a cartel, a pass, or some other act of public authority that puts him in the King's peace pro hac vice; But otherwise he is totally ex lex.*"<sup>3</sup>

## 3. *Licence to Trade*

(a) *Where an alien enemy, resident in the United Kingdom, is licensed by the Government to trade with the enemy, either generally, or in respect of a specified transaction, he may sue in the English courts in respect of such licensed commerce: Usparicha v. Noble.*<sup>4</sup>

A Spaniard, domiciled in England during the war between England and Spain, bought fish which he shipped on a Prussian ship for St. Andero. The British Government had granted a licence for the ship to proceed with her cargo. She was

<sup>1</sup> *Ib.*, 171, 172. Professor G. W. Keeton thinks that this is a case of quasi-contract. See per Lord Cozens-Hardy, M.R., in *Schaffernus v. Goldberg* [1916] 1 K.B. 284, 301, 302.

See also *Antoine v. Morshaud* (1815), 6 Taunt. 237. The action was upon bills of exchange drawn by the father of M., a prisoner at Verdun, payable to British subjects, prisoners there, indorsed to A., a French banker, and accepted by M. It was held that A could sue upon the return of peace. "This is a contract between two subjects in an enemy's country, which is perfectly legal," said Dallas, J.

<sup>2</sup> Regulation 18c (2) (b).

<sup>3</sup> (1799), 1 C. Rob. 196, 200, 201; author's italics. See also per Lord Wright in *The Soufracht Case* [1943] A.C. 230, 231.

<sup>4</sup> (1811), 13 East 332, 340, per Lord Ellenborough, C.J. See McNair, 182-188.

captured by French privateers and carried into Spain; by a French consular court she was condemned and sold with her cargo. France and Spain were then allied against England. Could the plaintiff recover on his policy of insurance? Lord Ellenborough, C.J., said:—

“The legal result of the licence granted in this case is, that not only the plaintiff, the person licensed, may sue in respect of such licensed commerce in our courts of law, but that the commerce itself is to be regarded as legalised for all purposes of its due and effectual prosecution . . . The Crown may exempt any persons and any branch of commerce, in its discretion, from the disabilities and forfeitures arising out of a state of war . . . To say that the plaintiff might export the goods specified in the licence from Great Britain to an enemy's country for the benefit of himself or others . . .; yet to hold that where he has so done, he could not insure; or, having insured, could not recover his loss . . . would be to convert the licence into an instrument of deception and fraud.”

The principle, shortly, is this:—

“The Crown, in licensing the end, impliedly licenses all the ordinary legitimate means of attaining that end.”

(b) In such a case (the plaintiff having no personal disability to sue), the *British agent* of both parties, in whose name the insurance was effected, could sue upon the policy in time of war: *Kensington v. Inglis*.<sup>1</sup>

If the trade has been licensed by the Government, effect ought to be given to the “ordinary means of indemnity by which that trade . . . might be best promoted and secured.”

(c) A licence to trade will be construed *liberally*: *Flindt v. Scott*.<sup>2</sup>

A licence was granted to F to export a cargo from London to Archangel (then a hostile port), and thence to import in the same ship a cargo of goods permitted by law to be imported. This licence was held to authorise an enemy, being a subject of the country to which the ship was licensed, to export from London. An insurance made by his agent here, for his benefit, was held lawful. Even though the loss was caused by an act of the hostile trader's own State, the agent was entitled to recover on the policy.<sup>3</sup>

<sup>1</sup> (1807), 8 East 273, 289, *per* Lord Ellenborough, C.J.

<sup>2</sup> (1814), 5 Taunt. 674, 701.

<sup>3</sup> Licences to trade may be *general* or *special*. A “general licence” is issued to all subjects or all persons, authorising trade with a particular place or in particular articles. A “special licence” is issued to an individual for a particular voyage or for the import or export of particular goods. A *general* licence is issued by the supreme authority only; a *special* licence may also be issued by a naval or military officer acting within his particular command (2 Pitt Cobbett, 94). These are *prerogative royal licences* relied on from the common law against trading with the enemy. They may be granted to an enemy. Licences granted by Board of Trade are statutory, affecting rights and liabilities under the statute.

(d) For an example of a licence, see *Leader v. Direction Der Disconto-gesellschaft*.<sup>1</sup> The Secretary of State, acting under the Aliens Restriction Act, 1914, and an Order in Council, granted a licence to a German bank to carry on business at their London office. They were permitted only to complete transactions entered into before the war which would normally have been carried through with their London office, but not to make assets available which would normally have been collected by their other offices, or to discharge liabilities which would normally have been discharged by such other offices. All licensed transactions were subject to the control of the Treasury. Undistributed assets were to be deposited with the Bank of England to the order of the Treasury. The plaintiffs sued the bank to recover the amount due on their current account at the Berlin office, and obtained judgment. They were not entitled to take in execution assets which were subject to the Treasury's control.

#### 4. Royal Licence to Proceed

"The operation of the rule refusing *persona standi in judicio* is always subject to permission being given by royal licence."

See *Trading with the Enemy, Legislation in Force on 1st March, 1945. His Majesty's Stationary Office*

##### 1. Countries and Territories.

(a) *French Oversea Territories (other than French Indo-China and Corsica).*

The Trading with the Enemy (Authorisation) Order, 1943, 15th July, 1943 (S.R. & O., 1943, No. 822).

(b) *Corsica.*

The Trading with the Enemy (Corsica) Order, 1943, 9th December, 1943 (S.R. & O., 1943, No. 1685).

(c) *Former Italian Overseas Territories.*

The Trading with the Enemy (Authorisation) Order, 1944, 26th January, 1944 (S.R. & O., 1944, No. 76).

(d) *Belgium*

The Trading with the Enemy (Authorisation) Order, 1945 (S.R. & O., 1945, No. 91).

##### 2. Patents, Designs, Copyrights and Trade Marks.

S.R. & O., 1940, No. 181, 1942, No. 2104.

##### 3. Securities.

S.R. & O., 1939, No. 1516, 1940, No. 105.

Order of the Board of Trade, 9th July, 1940 (S.R. & O., 1940, No. 1199).

##### 4. Shipping Claims.

General Licences, 5th February, 11th April, 1940 (S.R. & O., 1940, Nos. 168, 482).

Trading with the Enemy (Shipping Claims) Orders, 1940, 29th August, 1940 (S.R. & O., 1940, No. 1587).

Cargoes and Claims (Information) Order, 1940, 29th August, 1940 (S.R. & O., No. 1568).

Trading with the Enemy (Shipping Claims) Order, 1941, 25th February, 1941 (S.R. & O., 1941, No. 244).

A General Licence (S.R. & O., 1944, No. 1179) issued on 17th October, 1944, authorising "communication in writing with reference to any commercial, financial or other matter" with any person in any area in Italy which is in the occupation of His Majesty or a power allied with His Majesty. Similar licences have been issued in respect of Bulgaria (S.R. & O., 1945, No. 145, 9th February, 1945), and Finland (S.R. & O., 1945, No. 182, 14th February, 1945).

<sup>1</sup> [1915] 3 K.B. 154. For the terms, see 156, 157. See also Trotter, 46-52.

The Crown, and the Crown alone, has an absolute discretion to grant an alien enemy a royal licence to sue or to proceed."<sup>1</sup> In *The Soufracht Case*, no application for a royal licence had been made by the Dutch company; since the plea was not in bar, but in abatement, fresh proceedings might possibly have been initiated if a licence had been sought and granted.<sup>2</sup>

The licence of the Crown must be obtained, not the licence of the Board of Trade.<sup>3</sup>

### 5. Residence in Allied or Neutral Country

An alien enemy, residing in an allied or neutral country, and carrying on business through his partners in that country may probably sue in an English court: *In re Mary, Duchess of Sutherland*.<sup>4</sup>

Three partners resided and carried on business in Paris. After the issue of the writ claiming administration of the Duchess's estate, and just before war broke out, one of the partners, a German, went to Spain. An application to stay the proceedings on the ground that one of the partners was an alien enemy was refused.

In *In re Grimthorpe*,<sup>5</sup> Eve, J., ordered income to be paid to an Austrian countess, then resident in Rome, as long as she

<sup>1</sup> See per Viscount Simon, L.C., and Lord Wright in *The Soufracht Case* [1943] A.C. 203, 212, 231, 233. And see Lord Sumner's speech in *Rodriguez v. Speyer* [1919] A.C. 59, 131, *supra*, 133, 134, *infra*, 154.

<sup>2</sup> Per Lord Wright, *ib.*, 234. A similar procedure might have been invoked in *Rodriguez v. Speyer*, *supra*.

<sup>3</sup> The course that Viscount Simon, L.C., himself had suggested to the appellants in *The Fibrosa Case* [1943] A.C. 32, 35, 39, 40, influenced, perhaps, by the Trading with the Enemy Act, 1939, s. 1 (2), proviso (i), and by the licence obtained during the appeal in the Court of Appeal [1942] 2 K.B. 222, 231, per Lord Greene, M.R., he later disapproved in *The Soufracht Case* [1943] A.C. 203, 208, *arguendo*.

In *H. P. Drewry Société à Responsabilité Limitée v. Onassis* (1941), 71 Ll. L. Rep. 179, the Court of Appeal had treated letters from the Trading with the Enemy Branch (Treasury and Board of Trade) as a licence to proceed.

<sup>4</sup> (1915), 31 T.L.R. 248, per Warrington, J., following the observations of Lord Lindley in *Janson v. Driefontein Consolidated Gold Mines, Ltd.* [1902] A.C. 484, 505, 506, and the statement of Lord Reading, (C.J.), in *Porter v. Freudenberg* [1915] 1 K.B. 857, 868. The court made no order on appeal, holding that evidence of the status of the parties could more conveniently be given at the trial: (1915), 31 T.L.R. 394.

See Domke, 213, 214, citing a Canadian case, *I.S. White Engineering Corporation v. Canadian Car and Foundry Corporation* (1940), 4 D.L.R. 812. A German refugee, of Polish origin, domiciled in New York and temporarily residing in Paris (then unoccupied), was allowed to sue in Canada: he was not considered an alien enemy. The court intimated that it might attach moneys belonging to the plaintiff until the cessation of hostilities, or it might refuse permission to pay the sum recovered by the plaintiff, but he was, nevertheless, entitled to a declaration. The court referred to *Lampel v. Berger* (1917), 38 D.L.R. 47, where an Austro-Hungarian, residing in a neutral country, was granted a decree of specific performance of an agreement for the sale of land, but the court impounded the purchase money to prevent its user to assist the enemy.

<sup>5</sup> [1918] W.N. 16.

resided in an allied or neutral country or in the United Kingdom. "An enemy subject" she certainly was; she was not "an enemy" within the meaning of the Trading with the Enemy Acts, 1914-1916.

But an alien enemy, residing or carrying on business in a neutral country, who is *interested in a firm carrying on business in an enemy country* is not entitled to sue in an English court.<sup>1</sup>

#### 6. Nominal Co-Plaintiff

(a) An alien enemy who is merely a *nominal co-plaintiff* may be joined in an action by the real plaintiff who is himself not under disability to sue: *Mercedes Daimler Motor Co., Ltd. v. Daimler Motoren Gesellschaft & Maudsley Motor Co., Ltd.*<sup>2</sup>

A patent was vested jointly in the plaintiffs, an English company, and a German company; the English company should have the sole right to bring actions for infringement and might join the German company as co-plaintiffs. Warrington, J., said: "To deny the English company the right to prosecute this action would be to deny the right to a British subject to bring an action for his own protection."

Thus also, where pre-war debts are being recovered in the winding-up of an illegal partnership, the firm may sue for the debt, joining as co-plaintiff, merely for the purposes of form, an alien enemy partner resident in enemy territory: *Rodriguez v. Speyer Brothers*.<sup>3</sup>

Speyer Brothers were a firm of bankers in London, consisting of six partners: four British, one American, and one, a German resident in Germany. Upon the outbreak of war the partnership was *ipso facto* dissolved.<sup>4</sup> In 1916 the firm sued in the partnership name for a pre-war debt of £29,000. Judgment being signed in default of appearance, the defendant applied to have

<sup>1</sup> *Gebrüder van Uden v. Burrell* [1916] N.C. 391, 395, *per* Lord President Strathclyde, cited with approval by Viscount Simon, L.C., in *The Soufracht Case* [1943] A.C. 203, 210, 211.

In *Sundell v. Lotmar* (1942), 44 F. Supp. 816, residents of Finland (a country then allied with Germany) were not permitted to sue for damages which they incurred while visiting New York (Domke, 212, 213).

<sup>2</sup> (1915), 31 T.L.R. 178. See also *Rombach v. Gent* (1915), 84 L.J.K.B. 1558, 1560, *per* Lush, J., where a member of a firm had become an alien enemy but the action was, in substance, the receiver's action.

These cases were approved by the majority in *Rodriguez v. Speyer* [1919] A.C. 59. See *per* Lord Finlay, L.C., at 74, 75. The decision was severely criticised, however, by Lord Sumner, at 112: "I do not know how an order made in the Chancery Division enables the plaintiff to disregard the law in the King's Bench Division. As receiver, his business was to receive. He could not sue for the debt as a contracting party without the other contracting parties . . ." And see, at 121 for a comment on the *Mercedes Case*.

<sup>3</sup> [1919] A.C. 59.

<sup>4</sup> Partnership Act, 1890, s. 34.

the judgment set aside on the ground that one of the plaintiffs was an alien enemy. The House of Lords (by a majority) held that the plea of alien enemy did not apply to a case where a plaintiff was joined merely for the sake of conformity.

"The rule (that an alien enemy cannot sue in the King's courts) is founded on public policy"; to apply this rule to a case like the present, said Lord Finlay, L.C., would "cause great inconvenience and possibly most serious loss to the British members of the firm, by making it impossible for them to get in the firm's assets."<sup>1</sup> None of the assets would be handed over to the alien enemy during the war. To apply the rule here would be "to inflict hardship not on the enemy, but on British and neutral partners." When one looked at "the reason of the rule," the "balance of convenience" was in favour of allowing the firm to get in the debt, Viscount Haldane thought.<sup>2</sup>

(b) The *two dissenting judgments*—which maintain that "the rule as to suits by alien enemies (is treated) as an *unqualified rule of personal disability*"<sup>3</sup>—contain a critical summary of all the decided cases on the procedural capacity of an alien enemy.

"How can the court shut its eyes to the presence of an enemy before it?" Lord Sumner asks.<sup>4</sup> "The courts may eject him or admit him, but on principle they must do one thing or the other. They cannot ignore him. Nor can the point be left to the defendant to take or waive as he pleases, for it is a rule of the forum, not dissimilar to a limit upon its jurisdiction."

Nor could Herr von Speyer be joined as a defendant if not as a plaintiff: the judgment would then be in his favour and then, "under whatever disguise, he would be a successful actor in the courts of His Majesty, whose enemy he is. Is our law so foolish and is justice so blind that this disregard of the rule, if it be a rule, can be got over by calling a plaintiff something else? The notion of making him a defendant and then pretending that all is well, seems to me to be insupportable."<sup>5</sup> A judgment in his favour would improve his position: even by a judgment without satisfaction he would at once benefit: an interest in a specialty debt would accrue to him secured by a charge instead of an unsecured interest in a debt due upon a simple contract. He might even, during the war, recover satisfaction in a neutral country.<sup>6</sup>

Lord Sumner proceeds to show, from the authorities, that an alien enemy's "disability as an actor in litigation" is "absolute"

<sup>1</sup> [1919] A.C., at 66, 67, 71.

<sup>4</sup> *Ib.*, at 108.

<sup>2</sup> *Ib.*, at 86, 87.

<sup>5</sup> *Ib.*, at 113.

<sup>3</sup> *Ib.*, at 117, *per* Lord Sumner.

<sup>6</sup> *Ib.*, at 114.

and "unqualified."<sup>1</sup> Nor can a person be relieved from a legal disability because it would be good policy to do so.<sup>2</sup> Where a statute prohibits a thing to be done by contract, "the grounds of the prohibition are irrelevant." Nor are they more relevant if the prohibition is imposed by "an established rule of law."<sup>3</sup> "Trading with the enemy might almost as well go on unhindered if the right of litigating in our courts is a right which the enemy can always claim in a well-chosen case."<sup>4</sup> If the interest of the German national were vested in the Public Custodian and he were joined as co-plaintiff, the action could duly proceed; no public policy was involved in saving Speyer Brothers the costs or the delay "in getting their tackle in order." Nor was "hardship" a consideration, here: "It may be hard, and yet wholesome for all that."<sup>5</sup>

Lord Atkinson, also dissenting, pointed out that this rule of law, although originally based upon "public policy," had crystallised into a rigid rule of law; it is illegitimate for a judicial tribunal to disregard such a rule in a particular case in favour of a public policy of which it more approves: that would be "to usurp the prerogative and powers of the Legislature."<sup>6</sup> Nor, in *The Nordenfelt Case*,<sup>7</sup> had the House of Lords adopted new principles of public policy: "the facts alone are treated as new, not the principles."

It is respectfully submitted that the reasoning of Lord Sumner is right.<sup>8</sup> This view, put forward in the first edition, has the support of Lord Wright. The case, he says, must be "limited to its special facts": "beyond its precise facts," it is not an authority.

"In any case the decision is not one to be extended or treated as giving the court a general liberty to exercise the discretion which appertains to the Crown alone to give or refuse a licence in such cases. The discretion is for the executive and is not for the court."<sup>9</sup>

<sup>1</sup> [1919] A.C. at 117.

<sup>2</sup> *Ib.*, at 125.

<sup>3</sup> *Ib.*, at 126.

<sup>4</sup> *Ib.*, at 131.

<sup>5</sup> *Ib.*, at 132.

<sup>6</sup> *Ib.*, at 90. Upon the province of the judge, Lord Atkinson cites at 91, the passage from the speech of Parke, B., in *Egerton v. Earl Brownlow*, 4 H.L.C. 123. See also at 102 of [1919] A.C. for the two propositions laid down by Lord Atkinson.

<sup>7</sup> [1894] A.C. 535, 565, 574, *per* Lord Macnaghten; [1919] A.C., at 107.

<sup>8</sup> Professor H. C. Gutteridge, in 51 L.Q.R. 101, supports the decision of the majority.

<sup>9</sup> *The Socfracht Case* [1943] A.C. 203, 233. Upon public policy, see Lord Wright's essay on *Precedents* (1943), 8 *Cambridge Law Journal*, 118-145, at 132, 134.



### 7. *Executors suing en autre droit*

An alien enemy who is an executor, may sue *en autre droit*, i.e., in his representative capacity and not as a party interested in his own right: *Richfield v. Udall*.<sup>1</sup>

The same principle applies to administrators: *Brocks v. Phillips*.<sup>2</sup>

The old decisions, it must be admitted, are in conflict.<sup>3</sup> Lord Sumner was not satisfied that an alien enemy executor (or administrator) was entitled to sue; the only ground for enabling him to sue (if he possessed that right) would be that he would sue *en autre droit*.<sup>4</sup>

### 8. *Ransom Contracts*

An alien enemy was formerly allowed to sue on a *ransom Bill*—when peace had been restored: *Ricord v. Bettenham*.<sup>5</sup>

The captain of a French privateer sued the captain of an English ship for 300 pistoles (£236), the ransom of *The Syren* taken by the French privateer; the defendant had bound himself to pay this sum within two months. At the date of capture, England and France were at war. It was successfully argued that a captive might redeem his life by a ransom; nor did the death of the hostage put an end to the contract.

Ransom contracts are now regulated by the Naval Prize Act, 1864. By s. 45, His Majesty in Council may prohibit or allow, wholly or conditionally, contracts for the ransom of ships or goods belonging to British subjects, taken as prize by the

<sup>1</sup> (1667), Carter 48, 191. "I do not doubt so much whether Alien Enemy may be executor" (at 50). "An action by Alien Executor doth lye" (at 193), *per* Bridgman, C.J. See *Caroon's Case* (1625), Cro. Car. 8.

<sup>2</sup> (1599), Cro. Eliz. 684. See *per* Viscount Haldane and Lord Parmoor, in *Rodriguez v. Speyer Brothers* [1919] A.C. 59, 84, 137, and the speech of Lord Finlay, L.C. (at 70), who, after examining the authorities, agreed that "the weight of authority is not in favour of the view that an alien enemy executor is unable to sue." See the observations of Lord Atkinson (at 89 and 90).

<sup>3</sup> With these decisions, contrast *Anon.* (1589), Cro. Eliz. 142; *Villa v. Dimock* (1694), Skin. 370.

<sup>4</sup> *Rodriguez v. Speyer* [1919] A.C. 59, 118. The cases are collected in the argument for the respondents (at 63).

<sup>5</sup> (1765), 3 Burr. 1734, 1739, *per* Lord Mansfield, the first reported English case on the subject. In the Admiralty Court, the suit was instituted by the hostage: *The Hoop* (1799), 1 C. Rob. 196, 201, *per* Sir W. Scott. See Lord Sumner's criticism in *Rodriguez v. Speyer* [1919] A.C. 59, 121, 122, upon Lord Mansfield's appeal, in *Cornu v. Blackburne*, 2 Doug. 648, to "the eternal rules of justice," to which (Lord Sumner comments) "no lawyer appeals except in extremity."

For a fascinating account of "Ransom Bills," see Senior, *Ransom Bills* (1918), 34 L.Q.R., 49-62. By a ransom bill, the commander of the captured vessel "bound himself and the owner of the ship and cargo to pay a certain sum of money at a future day named therein." The legality of ransoms ended at the close of the eighteenth century; the Act of 1864 restored their legality within the provisions of the relevant Order in Council. In modern naval warfare, the practice has become defunct.

enemy. Those contracts are exclusively within the jurisdiction of the Probate, Divorce and Admiralty Division of the High Court, as a Prize Court. Contracts in contravention will be deemed to have been given for an illegal consideration. A British captor may grant ransom to an enemy vessel only in cases allowed by Order in Council.<sup>1</sup>

### 9. Claimants before Prize Court

The following passage from the head-note in *The Glenroy*<sup>2</sup> correctly states the modern law :—

“ An enemy alien must obtain the licence of the Crown to entitle him to be heard in the Prize Court unless his claim is based on some ground (such as an international treaty or convention, a cartel, or a pass) which enables him to sustain a *persona standi in judicio*, and this is so even if he does not assert any positive right to the release of the subject-matter of his claim, but merely resists its condemnation. The Prize Court itself has no discretion to hear an alien enemy whose claim is not based on an immunity recognised under the law of nations administered by the Prize Court.”

In September, 1939, the *Glenroy* was voyaging from the East to Hamburg via London. In her cargo were 2,240 bags of beans consigned, under a contract made in July, 1939, by a Japanese company (the Mitsui company) to their branch office in Hamburg. After the outbreak of war the *Glenroy* was diverted to Liverpool. In November the beans were seized in prize; a writ in prize was issued and appearance was entered for Mitsui & Co., Ltd., as the owners. They were the branch office in London, but before Japan entered the war they were not a legal entity. In December, 1941, after Japan became a belligerent, a controller was appointed to supervise the winding up of the London branch, which became, for the purpose of winding up, a legal entity apart from the parent branch.<sup>3</sup> In March, 1943, he entered an appearance for himself as controller and as controller of the London branch, and of the Japanese company as “ the true lawful and sole owners of the beans ” shipped before the war and not liable to be treated as contraband nor liable to condemnation on any other ground.

The Procurator-General took out a summons raising three preliminary points :—

(a) Whether a claimant, who, by municipal law, was an alien enemy, required specific authority from the Crown to proceed in a Court of Prize ;

<sup>1</sup> 2 Pitt Cobbett, 95, 96.

<sup>2</sup> [1943] P. 109. The case was heard by Lord Merriman, P.

<sup>3</sup> *Ib.*, at 113, per Lord Merriman, P., citing the decision of Bennett, J., in *re Banca Commerciale Italiana* [1943] W.N. 86.

(b) Whether the present claimant required any further authority to proceed ;

(c) What practice should be prescribed to regulate the procedure.

It was argued for the Procurator-General<sup>1</sup> that, *prima facie*, an alien enemy has no *locus standi* in the Prize Court unless he can show authority to come within the King's peace by cartel, pass, treaty, or convention, which *pro hac vice* entitle him to be heard. During the last war an enemy, relying on some international convention, was allowed to appear ; in the present war, no objection being taken, the court allowed an enemy to appear who was alleging an international law analogous to the Hague Convention which had been denounced.<sup>2</sup> Upon the authority of *The Sovfracht Case*,<sup>3</sup> however, the court could not waive the necessity for a royal licence. On the other hand, in no case in prize during the last war had a "royal licence" been applied for. There would be no objection to the view that the court has a discretion ; the Prize Courts of nearly all other countries allowed an unlimited right of audience to enemy claimants.<sup>4</sup>

The claimant contended that appointment by the Board of Trade was sufficient licence to a controller to appear in the Prize Court. That an alien enemy could not sue unless he was within the King's peace was conceded. The Prize Court Rules, 1939 (made under the Prize Courts Act, 1894), command an enemy alien whose goods have been seized to enter an appearance. Between claiming release and resisting condemnation there is a distinction : a "claimant" resisting condemnation is in the position of a defendant.<sup>5</sup>

The Prize Court, said Lord Merriman, P., is bound by any enactment of the Legislature governing its procedure. No such enactment was here in question, but these preliminary points were raised in view of *The Sovfracht Case*.<sup>6</sup> That case dealt

<sup>1</sup> [1943] P. 109, at 111-112.

<sup>2</sup> *The Pomona* [1943] P. 24, 27. Was an enemy merchant ship in a belligerent port at the outbreak of war immune from confiscation and, if prevented from departing by *force majeure*, entitled to days of grace ? The vessel was seized as prize and was subsequently requisitioned. The German owners claimed that the vessel could only be detained, not confiscated. See, on motion for leave to requisition (1940), 1 Ll. P.C. (2nd), 1, 2, 5, *per* Sir Boyd Merriman, P.

<sup>3</sup> [1943], at 203.

<sup>4</sup> See Colombos, s. 333. See also McNair, 66, who favours extending permission to an enemy who bases his claim upon a rule of customary international law. He is entitled to be heard in defence of his rights under an international agreement : *The Hakun* [1918] A.C. 148, 150, *per* Lord Parker.

<sup>5</sup> [1943] P., at 112.

<sup>6</sup> [1943] A.C. 203.

with municipal law and any references to prize law were strictly *obiter dicta*.<sup>1</sup>

The rule which provides that an alien enemy, before entering appearance, must file in the registry an affidavit stating the grounds of his claim<sup>2</sup> does not give him a general right to appear; the object is merely to enable the court to decide whether he has grounds that enable him to be heard.<sup>3</sup> After quoting the famous passage from Sir W. Scott's judgment in *The Hoop*<sup>4</sup> and a passage by Dr. Lushington in *The Panaja Drapaniotisa*<sup>5</sup> on the practice in prize, Lord Merriman observes:—

"... unless the enemy could show that he could sustain a *persona standi in judicio* by virtue of something which suspended his enemy character *pro hac vice*, it was settled law both during the Napoleonic and the Crimean wars that he had no right to be heard, and it was equally well settled that in his absence the sentence of condemnation would be completely valid as well against him as against the whole world."<sup>6</sup>

In *The Mowe*<sup>7</sup> the question arose whether an enemy owner who relied on art. 2 of the Sixth Hague Convention could appear.<sup>8</sup> Sir Samuel Evans, P., there laid it down that "... the practice of the court shall be, that wherever an alien enemy conceives that he is entitled to any protection, privilege, or relief under any of the *Hague Conventions* of 1907, he shall be entitled to appear as a claimant and to argue his *claim before this court*."<sup>9</sup> The question, he held, was one, not of international law, but of the practice of the court. This direction accordingly

<sup>1</sup> [1943] P., at 114

<sup>2</sup> Prize Court Rules, 1939, Ord 111, r 5

<sup>3</sup> [1943] P., at 115, citing *The Chile* (1914), 1 Ll. P C 1, 31, *per* Sir Samuel Evans, P., [1914] P. 212, 216. This was the first case heard in Prize during the last war (4th September, 1914). The President struck out the owners' affidavit: it set out no grounds showing the owners' right to appeal. He reserved the general question whether they had any right to appear at all.

<sup>4</sup> (1799), 1 C Rob. 196, 200, *supra*, 149.

<sup>5</sup> (1856), Spinks 337.

<sup>6</sup> [1943] P., at 116, citing *The Falcon* (1805), 1 C. Rob. 194, 199; Pratt's Story, 111. These principles were adopted by Sir S. Evans, P., in *The Marie Glaeser* [1914] P. 218, 221–223.

<sup>7</sup> [1915] P. 1.

<sup>8</sup> A merchant ship which, owing to circumstances beyond its control, could not leave an enemy port after days of grace might not be confiscated, but merely detained and ultimately released or requisitioned with compensation.

<sup>9</sup> [1915] P. 1, 15; author's italics. The decision was cited with approval by Lord Sumner in *The Vesta* [1921] 1 A C. 774, 786.

For an account of the nature and the functions of the Prize Court, see the advice of Lord Parker in *The Zamora* [1916] 2 A.C. 77, 88–112; Colombeau, *Law of Prize* (1940), 2nd ed., chaps. I and II.

was given in order "to conform to sound ideas of what is fair and just."

Lord Merriman, examining this decision in *The Glenroy*, declined to hold that the Prize Court is "restricted only by its own discretion and that it is open to me to give an unrestricted right of audience to any enemy claimant."<sup>1</sup> This was not the true effect of Sir S. Evans' judgment. The enemy claimant in *The Mowe* was relying on an international treaty, prohibiting condemnation, but not suspending enemy character. But suspension of enemy character is "a purely notional conception. It may have greater or less substance according to the circumstances of the case." It would have greater substance in the case of an enemy licensed to trade than in the case of a ship allowed to depart within the days of grace. "The real contrast appears to be between complete immunity from capture coupled with the fiction that the hostile character is suspended, and mere immunity from condemnation coupled with the reality that the hostile character remains."<sup>2</sup> Sir S. Evans was dealing with The Hague Conventions *as a whole* and was considering whether a uniform rule of the right of the enemy owner to appear should prevail in all cases of claimants who might be entitled to protection or relief *under those Conventions*.<sup>3</sup> In this context he had declared the matter to be one, not of international law, but of the practice of the Prize Court.

"But no such question arises here, and I am not prepared to deduce from the passage quoted an unfettered discretion to extend the *locus standi* of enemy aliens indiscriminately. In effect, the decision in *The Mowe* (*supra*) seems to me to be an excellent example of the exception proving the rule."<sup>4</sup>

"The wider claim to an unfettered power of dispensation goes too far." Lord Wright had denied that the court has a general liberty to exercise the discretion which appertains to the Crown alone to give or refuse a licence in such cases. The discretion is for the executive and not for the court."<sup>5</sup>

The claim in *The Roumanian*<sup>6</sup> by enemy owners of a cargo of oil was based, not upon the general law of nations, but upon the contention that the German owners, although a company incorporated at Bremen, were in reality a combine of companies trading in allied or neutral countries, and not controlled by

<sup>1</sup> [1943] P. 109, at 118.

<sup>2</sup> *Ib.*, at 118.

<sup>3</sup> [1915] P., at 13.

<sup>4</sup> [1943] P., at 120.

<sup>5</sup> *The Sovfracht Case* [1943] A.C. 203, at 233.

<sup>6</sup> [1915] P. 26; [1916] A.C. 124. For the arguments, Lord Merriman refers to 1 Ll. P.C. 191, 193-195, 227, 266, 267; 2 Ll. P.C., at 380.

enemies of the Crown. "The claim was based on exemption from enemy character."<sup>1</sup>

Lord Sumner, in *The Pindos*,<sup>2</sup> declared that since the claim was made under the Suez Canal Convention, 1888, no objection was raised to the presence of enemy owners to be heard on appeal. Thus, also, in *The Hakan*,<sup>3</sup> Lord Parker said: "according to usual practice of the Prize Court even enemies may appear and be heard in defence of their rights under an international agreement." In *The Vesta*,<sup>4</sup> Lord Sumner did not intend to suggest "a wide range of exemption from the general rule in contrast with the limited area of international convention."<sup>5</sup> Lord Merriman confessed that in *The Pomona*<sup>6</sup> he had been mistaken in thinking that he had a discretion to hear enemy claimants who had based their claim on a supposed international principle analogous to a Convention after the Convention had been denounced by England.

It had also been argued that a claimant who merely resisted condemnation was not a claimant who asserted rights, and that therefore he could appear and be heard in his defence upon the principles laid down in *Porter v. Freudenberg*.<sup>7</sup> The answer was twofold. *First*, the owner of goods seized in prize is in the position of a claimant. *Secondly*, the claim is not for release, but "for the said ship," or for the goods, as the case may be, with incidental claims for loss, costs, charges, damages and expenses. "In prize, the essence of the claim is that the claimant owns the ship or goods, that they are not condemnable and, therefore, that they should be released to him."<sup>8</sup>

*The Sovfracht Case*<sup>9</sup> decided that—

"the operation of the rule refusing a *persona standi in judicio* is always subject to permission being given by royal licence . . . and I have no doubt whatever that the same applies to a court of prize in any case in which prize law refuses a *locus standi*."<sup>10</sup>

It had been suggested, Lord Merriman continued, that after *The Sovfracht Case* the Prize Court could not recognise any exception to the rule refusing a *persona standi in judicio*. The first proposition of Viscount Simon, L.C., is this:—

"The test of enemy character is fundamentally the same whether the question arises over a claim to sue in our courts,

<sup>1</sup> [1943] P., at 122.

<sup>2</sup> [1943] P., at 123, 124.

<sup>3</sup> [1916] A.C. 193.

<sup>4</sup> (1939), 188 L.T. Jo. 410.

<sup>5</sup> [1918] A.C. 148, 150.

<sup>7</sup> [1915] K.B. 857, 882.

<sup>6</sup> [1921] 1 A.C. 774.

<sup>8</sup> [1943] P., at 125.

<sup>9</sup> [1943] A.C. 203, 211, 218, 219, 227: *per* Viscount Simon, L.C. Proposition No. 7; and *per* Lord Wright.

<sup>10</sup> [1943] P., at 125.

or over issues raised in a court of prize, or over a charge of trading with the enemy at common law."<sup>1</sup>

This general statement, said Lord Merriman, appears to ignore the special case arising out of Convention VI.<sup>2</sup> But this statement did not intend to exclude the cases covered by the old rule in prize; the House of Lords could not have intended "to unsettle the established procedure in prize."<sup>3</sup> But the Prize Court has

"no right to extend to an alien enemy any indulgence beyond what was settled during the last war as being the law of nations administered by the Prize Court of this country in this respect."<sup>4</sup>

The President proceeded to prescribe the practice to be followed.<sup>4</sup>

The *affidavits*<sup>5</sup> should show (a) the *capacity* in which the deponent purports to speak on behalf of the claimants, and (b) *the grounds of the claim with sufficient particularity*, disclosing the basis of the assertion of a *persona standi in judicio*. A person who, after entering an appearance, becomes an alien enemy should file an affidavit on the same lines. In the absence of a sufficient affidavit, the Procurator-General may move to strike out an appearance or the claim, or both. The duty of the court, if in doubt, to be assured of the claimant's *persona standi in judicio*, and if so, of his regular representation before the courts, cannot be abrogated, but it is inconvenient that these matters should depend upon the initiative of the court or should stand over until the hearing. The Procurator-General should bring this matter to the test by interlocutory application under Ord. XX. The validity of a solicitor's retainer by an enemy claimant can be raised in a particular case, either by the Procurator-General or by the court itself.<sup>6</sup>

### III. ALIEN ENEMY DEFENDANT

#### 1. *Liability to be sued: Defendant's Privileges*

An alien enemy may be sued in proceedings begun before or after the outbreak of war. He may be represented by solicitor or counsel, who may, by licence, hold the intercourse with him required for obtaining instructions.<sup>7</sup> Subject to exceptions

<sup>1</sup> [1943] A.C. 203, at 211. See also *per* Lord Wright, at 219 and 227.

<sup>2</sup> [1943] P., at 125

<sup>3</sup> *Ib.*, at 126.

<sup>4</sup> *Ib.*, at 127. See Rowson, *British Prize Law*, 61 L.Q.R. 65.

<sup>5</sup> Under Prize Court Rules, 1939, Ord. XI, r. 22; Ord. CXI, r. 5.

<sup>6</sup> [1943] P., at 128.

<sup>7</sup> McNair, 318. The *obiter dictum* of Lord Porter in *The Soufracht Case* [1943] A.C. 203, 253, 254, cannot, it is submitted, apply to a case where the enemy is a

stated below, he has the rights and duties of a defendant: *Robinson & Co. v. Continental Insurance Company of Mannheim*.<sup>1</sup>

British subjects sued a German insurance company on a marine policy; pleadings were closed before war began. The defendants' application for a stay was dismissed.

"To hold that a subject's right of suit is suspended against an alien enemy," said Bailhache, J., "is to injure a British subject and to favour an alien enemy and to defeat the object and reason of the suspensory rule. It is to turn a disability into a relief."

The liability to be sued carries with it—

"The right to use all the means and appliances of defence,"<sup>2</sup> which includes the right to defend personally or by solicitor or counsel:

"To allow an action against an alien enemy to proceed and to refuse to allow him to appear and defend himself would be opposed to the fundamental principles of justice. No state of war could, in my view, demand or justify the condemnation by a civil court of a man unheard."<sup>3</sup>

In *Porter v. Freudenberg*,<sup>4</sup> the action was to recover under a lease made in 1903, a quarter's rent due in September, 1914.

defendant. No licence to represent an enemy is apparently required in American courts. Domke, 230, 231. Upon licence required here, see Cmd. 6591, para. 11.

"Even where an enemy is assailed in court with respect to his person or property, he has the right to defend, even though he might not have the right to originally sue or litigate as plaintiff," cited by Domke, 236. This right is expressly conferred upon enemy individuals and corporations by § 7 (b) of the United States Trading with the Enemy Act, 1917. See *per Brandeis, J.*, in *The Watts Case* (1918), 248 U.S. 9, 22, *infra*, 168, 169.

In Canada, the written consent of the custodian is necessary before an enemy is sued. See *Note* (1944), 22 Can. Bar Rev. 722-4, on *The Bayn Case* [1944] 2 D.L.R. 616, 3 D.L.R. 602.

<sup>1</sup> [1915] 1 K.B. 155. See S. Nusbaum, *The Alien Enemy as Defendant* (1943), 43 Columbia L. Rev., 1050-1065, Domke, chap. 16, *Suits Against Enemies*, 236-252.

<sup>2</sup> Cited at 160 from *McVeigh v. United States* (1870), 11 Wallace 259, 267, *per* Swayne, J. "For as an alien enemy may be sued at law and may have process to compel the appearance of his witnesses, so he may have the benefit of a discovery," cited *ib.*, from 1 Bacon's Abridgment, 183. Both passages were cited and approved in *Porter v. Freudenberg* [1915] 1 K.B. 857, 881.

<sup>3</sup> [1915] 1 K.B., at 161. It is "a principle of natural justice," that "no party ought to be condemned unheard." See 1932, Cmd. 4060, at 79, 80.

Upon "natural justice," see *per* Lord Wright, in *General Medical Council v. Spackman* [1943] A.C. 627, 640-3, and authorities there cited.

Upon the right of an alien enemy to have counsel and to consult with him, see 43 Columbia L. Rev., 1057, 1058.

<sup>4</sup> [1915] 1 K.B. 587, 580, 883. See *Windsor v. McVeigh* (1876), 93 U.S. 274, 277, *per* Field, J.: "A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial termination of his rights, and is not entitled to respect in any other tribunal." And again (at 278): "The law is, and always has been, that whenever notice or citation is required the party cited has the right to appear and be heard; and when the latter is denied, the former is ineffectual for any purpose."



The defendant lived and carried on business in Berlin, but had a branch business and an agent at Hanover Square.

Lord Reading, C.J., cited, with approval, the observations of Bailhache, J., and continued:—

“To allow the alien enemy to be sued or proceeded against during war is to permit subjects of the King or alien friends to enforce their rights with the assistance of the King against the enemy.”

Since an alien enemy can be sued—

“it follows that he can appear and be heard in his defence and may take all such steps as may be deemed necessary for the proper presentment of his defence. If he is brought at the suit of a party before a court of justice he must have the right of submitting his answer to the court. To deny him that right would be to deny him justice.”

## 2. Service on Alien Enemy

(a) Where an alien enemy defendant is resident in an enemy country but carries on business here by means of an agent, the plaintiff may obtain *leave to issue a concurrent writ and to make substituted service of a notice of the writ* by service of the notice upon the defendant's agent in this country: *Porter v. Freudenberg*.<sup>1</sup>

“An alien enemy ‘according to the fundamental principles of English law [is] entitled to effective notice of the proceedings against him,’ ”

Where the defendant is neither a British subject nor in British dominions he cannot be served with a writ. He may be served, however, with a notice of a writ<sup>2</sup>; this notice, subject to certain exceptions, must, “wherever practicable,” be personally served.<sup>3</sup> Since an alien enemy residing in enemy territory cannot be personally served, it became necessary (subject to the power to dispense with service, dealt with below), to make *substituted service*.<sup>4</sup> Now, “there cannot be a good substituted service where personal service would not be legally possible.”<sup>5</sup>

<sup>1</sup> [1915] 1 K.B. 857, 887, 890. See 43 Columbia L. Rev., 1055: service, in certain American cases, was held “satisfactory on an agent designated by an enemy individual before the war, and it was stressed that such agency is not revoked by war, and that, of course, service on such person in no way constitutes commercial intercourse prohibited by law.”

<sup>2</sup> Order XI, r. 6.

<sup>3</sup> Order IX, r. 2. See Ord. XI, r. 7.

<sup>4</sup> Order XI, r. 1; see *The Annual Practice* (1944), 99, for contents of the affidavit.

<sup>5</sup> *Per* Lord Esher, M.R., in *Worcester City & County Banking Co v Firbank, Pauling & Co.* [1894] 1 Q.B. 784, 788, 790, 792. For a valuable summary of the rules of substituted service and the exceptions to the above principle, see *Porter v. Freudenberg* [1915] 1 K.B. 857, 887–889, *per* Lord Reading, C.J.

To secure an order for substituted service, the plaintiff must prove *first*, that "there exists a practical impossibility of actual service," and *secondly*, that the method of substituted service proposed "is one which will in all reasonable probability, if not certainty, be effective to bring knowledge of the writ . . . to the defendant." Substituted service of a notice of a writ will be permitted in similar circumstances. In *Porter v. Freudenberg*, leave was given to issue a concurrent writ against the defendant and to serve notice of the writ in Berlin. The case was referred back to chambers for directions as to the mode of effecting such service. Substituted service of the notice of the writ was probably effected upon the defendant's agent resident in London.<sup>1</sup>

(b) "*Constructive service*," e.g., service by public notice or advertisement, is not permitted by English procedure; a defendant who had in fact received no notice of the proceedings might thereby be condemned unheard. Upon this principle, the Legal Proceedings against Enemies Act, 1915,<sup>2</sup> made inroad. By this statute when the plaintiff was a British subject and was entitled to sue in the High Court, and the writ was endorsed only with a claim for a declaration concerning the effect of the war upon a pre-war contract, and there was written evidence of the contract, leave could be given to issue a writ for service on an enemy *out of the jurisdiction* by "an enemy service order," directing substituted or other service, or the substitution of notice for service by advertisement or otherwise. The Lord Chancellor was empowered to make rules for expediting proceedings when the defendant did not appear. When an enemy service order was made, and the best evidence of a document could not be obtained, other evidence was admissible, as appeared proper in the circumstances. Yet, even though an enemy service order had been made, the court retained power, if the case could not be properly dealt with, to dismiss the case without prejudice to subsequent proceedings.

As Lord Reading, C.J., pointed out in *Porter v. Freudenberg*, an English judgment against an alien enemy resident in an enemy State is of little, if any, value, unless there is property in this country which can be reached in execution. In that case, there is frequently some other person, e.g., an agent, upon whom an order for substituted service, could be made.

(c) On 17th December, 1940, Viscount Caldecote, C.J., issued a *Notice upon Service of Process in Germany and in countries occupied by Germany*. As the German Government had refused

<sup>1</sup> [1915] 1 K.B., at 890. See Trotter, 101-104

<sup>2</sup> Repealed, with saving, by the Statute Law Revision Act, 1927. Practice in American courts varies. In certain cases the courts have accepted "service by publication on an absent enemy defendant." But the general trend is against this method: 43 Columbia L. Rev., 1055, 1056.

to serve and had returned notices of writs forwarded by the United States Embassy, "recourse must be had to the ordinary practice of substituted service—which may be by advertisement."

"Subject to the discretion of the court or a judge, proof of inability to effect personal service will be satisfied if the affidavit states that the proposed defendant is resident in Germany or in a country occupied by Germany, and gives the grounds on which the deponent bases his statement."<sup>1</sup>

In *Re an Intended Action between L. V. Churchill & Co., Ltd. and Lonberg*,<sup>2</sup> the proposed plaintiffs, an English company, sought to sue upon a contract, L, a Dane living in Denmark, then being enemy-occupied territory. The company asked for an order for substituted service by inserting an advertisement, giving notice of the action in a Swedish newspaper stated to have a "certain circulation" in Copenhagen. Uthwatt, J., refused the order; his decision was upheld by the Court of Appeal. The German authorities had taken every step to prevent notice of proceedings against persons in Germany or German-occupied territory from reaching those persons. Lord Greene, M.R., declared that the *Notice* issued by the Lord Chief Justice did not modify the law laid down in *Porter v. Freudenberg*.

"To publish in *The Times* an advertisement purporting to bring to the notice of somebody in Germany the fact that a writ has been issued against him, and giving him sixteen days in which to appear, reduces the procedure of the courts to a solemn farce and, if there is any such impression in King's Bench Chambers and elsewhere, it must be removed."<sup>3</sup>

In an adjourned summons raising the construction of a will where a defendant, an enemy alien, whom it had been impossible to serve, was resident in Germany, Uthwatt, J., pointed out that "in many cases British subjects cannot get their rights ascertained against enemy aliens."<sup>4</sup>

### 3. Dispensing with Service

The point has been met by a *new rule* enabling the court, with safeguards, to "dispense with service of a writ of summons or a notice of a writ of summons on any defendant who is an enemy within the meaning of the *Trading with the Enemy Act, 1939*, as amended by or under any enactment."<sup>5</sup>

<sup>1</sup> [1940] W.N. 456. This notice follows the notice issued on 18th April, 1916, by Lord Reading, C.J. (Trotter, 103, 104).

<sup>2</sup> (1941), 3 All E.R. 137.

<sup>3</sup> *Ib.*, 139, 140.

<sup>4</sup> *In re de Barbe* [1941] W.N. 218, 219.

<sup>5</sup> Order IX, r. 14B (1) (31st October, 1941). Thus, also, r. 302 (added in 1942), of *Rules of Civil Practice of New York*, provides that service may be similarly

No such order can be made unless—

“(a) the court or judge is satisfied that prompt personal service on such defendant is impossible or if effected could not be proved, and that the case is not one in which an order for substituted service on such defendant ought to be made; and

“(b) the applicant produces to the court or judge a statement of claim signed by counsel and an affidavit showing that the applicant is entitled on merits to succeed in the action.”<sup>1</sup>

Where, under this rule, an order dispensing with service is made, and judgment is given against the defendant, the judgment may be set aside or varied upon terms.<sup>2</sup> The rule applies, *mutatis mutandis*, to proceedings other than actions begun by writ.<sup>3</sup>

(a) “A soldier in His Majesty’s Army, who has been taken prisoner during war and is detained in enemy territory, is not an enemy in any sense of the word”: *Vandyke v. Adams*.<sup>4</sup>

The plaintiff applied for leave to issue a concurrent writ for service out of the jurisdiction and to make substituted service of a notice of the writ of service of the notice in London on solicitors who had acted for the defendant. Alternatively, he applied for an order under Ord. IX, r. 14B, dispensing with service. The claim was for rent. The defendant had been taken prisoner. It was contended that the defendant, being “resident” in enemy territory, was an “enemy” within Trading with the Enemy Act, 1939, s. 2 (1) (b). In one sense the defendant was “resident” there, but only under *force majeure*; he could not be regarded for the purposes of the Act, as an “enemy.”

(b) *The power to dispense with service under this rule does not apply to a petition for divorce: Read v. Read*.<sup>5</sup>

dispensed with and that the papers be sent to the Secretary of the Treasury at Washington (Domke, 237).

The Alien Property Custodian in the United States has made an order relating to service upon any person within any designated enemy country or any enemy-occupied territory. The receipt by him of a copy of such process or notice sent by registered mail to him at Washington shall be service if, within sixty days from receipt, he files with the court issuing such process a written acceptance. (General Order No. 6, 1942, 7 Fed. Reg. 6199, cited by Domke, 237, 238.)

<sup>1</sup> Paragraph (2).

<sup>2</sup> Paragraph (3). Order XIII, r. 10, applies to such judgment. Upon this paragraph, see *per* Lord Greene, M.R., in *Read v. Read* [1942] P. 87, 92, *infra*, 168.

<sup>3</sup> Paragraph (4). But not to divorce proceedings. See *infra*, 168.

<sup>4</sup> [1942] Ch. 155, 157, *per* Farwell, J. See Domke, 118, 119; Cmd. 6591, paras. 8, 21.

<sup>5</sup> [1942] P. 87, 92, *per* Lord Greene, M.R., at 93, *per* Goddard, L.J.

Under the proviso to s. 42 of the Matrimonial Causes Act, 1857, however, the court may dispense with service of a petition in a matrimonial cause altogether “in case it may seem necessary or expedient so to do,” e.g.: (1) where a respondent had already obtained a decree in a German court; or (2) where a wife had already

Lord Greene, M.R., explains the basis and the limitations of the rule and why it cannot apply to matrimonial causes. By para. (3), the judgment, where service has been dispensed with, is liable to be set aside.

"Rule 14B includes a departure from what has always been a rule of our jurisprudence, namely, that constructive service is not recognised. Service must be personal or substituted, and on well-established principles substituted service can only be ordered where there is a reasonable probability that it will come to the notice of the person to be affected. The system of constructive service where a defendant can have judgment recovered against him without his having any opportunity of knowing that the proceedings are on foot is a thing against which English jurisprudence has always set its face, but, owing to the particular circumstances of the present war, it was found that a strict adherence to that rule would or might result in injustice to British subjects who wished to enforce their rights against enemies."<sup>1</sup>

The new procedure was encircled with safeguards. Thus, the defendant might ask for the judgment to be set aside. Paragraph (3) is "an essential part of the whole conception underlying the rule and a part of the justification for the departure by this rule from our long-standing system."

#### 4. When Proceedings may be Stayed

In *Watts, Watts & Company, Ltd. v. Unione Austriaca Di Navigazione*,<sup>2</sup> the Supreme Court of the United States stayed an action against an alien enemy, heard during the war of 1914-18, until the restoration of peace and until adequate presentation of the defence should become possible.

A British agent sued an Austro-Hungarian corporation, while those countries were at war and the United States was a neutral, to recover the price of coal sold and delivered before the war to the corporation in Algiers. After the case was heard upon agreed facts and proof of foreign law, the District Court declined

obtained a decree of separation when the husband was here, and now sought to extend the relief to dissolution on precisely the same grounds, as Henn Collins, J., explains in *Read v. Read* (No. 2) [1942] W.N. 180, but not where the petition prays for divorce on the ground of desertion and the husband's last known address was in enemy-occupied territory and his present address unascertainable. Where petitions involve a change of status, the court should normally be satisfied that the respondent was aware of the petition and has had an opportunity of entering an answer: *Luccioni v. Luccioni* (1943), 1 All E.R. 260, 262, *per* Lord Merriman, P.; affirmed, 384, 386; but it is most important that every judge who is asked to make an order dispensing with service of a petition of divorce should remember that "in matters of discretion, no one case can be an authority for another": *per* du Parcq, L.J. [1943] P. 49, 50.

<sup>1</sup> [1942] P., at 92.

<sup>2</sup> 1918, 248 U.S. 9

to proceed because the belligerent countries had prohibited the payment of debts to each other's subjects, and dismissed the case without prejudice. On certiorari from the Circuit Court of Appeals, which had affirmed the decree, the Supreme Court held that the respondent, though now become an alien enemy (the United States had since entered the war), could defend, but that in view of the impossibility of properly preparing the defence, the action should be stayed. Brandeis, J., said :—

“ Under existing circumstances, dismissal of the libel is not consistent with the demands of justice.”<sup>1</sup>

Intercourse between subjects of Austria-Hungary outside the United States and persons in the United States was prohibited by law ; in fact, free intercourse between residents of the two countries had become impossible. Although the facts had been agreed and the foreign law proved three years ago, there might be reasons why the evidence should be supplemented—

“ We cannot say that, for the proper conduct of the defense, consultations between client and counsel and intercourse between their respective countries may not be essential even at this stage. The war precludes this.”<sup>2</sup>

The case was remitted to the District Court, no action to be taken (save to preserve the security and the rights of the parties in *statu quo*), until, by the restoration of peace or otherwise, “ it may become possible for the respondent to present its defense adequately.”<sup>3</sup>

Brandeis, J., refers to the judgment of Bailhache, J., in *Robinson & Co. v. Continental Insurance Company of Mannheim*.<sup>4</sup> In that case the presence of the defendant's representative at the trial was not necessary and

“ no question arises in this case as to whether an express licence to come into this country is necessary or whether a licence would be implied from the fact of the process of the court, and I express no opinion upon it. It may be that in this case the war has so hampered the defendants in the preparation of their case, in their witnesses, or in other ways, that it would be right to grant them a postponement on those grounds. If any application is made to postpone the trial on grounds of that character it will be dealt with on its merits.”

And in *Birge-Forbes Co. v. Heye*,<sup>5</sup> Holmes, J., citing the *Watts Case*,<sup>6</sup> said :—

“ When the enemy is defendant, justice to him may require the suspension of the case.”

<sup>1</sup> (1918), 248 U.S., at 21.

<sup>2</sup> *Ib.*, at 22.

<sup>3</sup> *Ib.*, at 22, 23.

<sup>4</sup> [1915] 1 K.B. 155, 161-162.

<sup>5</sup> (1920), 251 U.S. 317, 323.

<sup>6</sup> (1918), 248 U.S. 9, *supra*.

'Upon the circumstances which have weighed with American State courts in refusing a stay, a learned writer mentions the following :—

"The fact that substantially all the evidence was produced or available here, that a verified answer had been made, ample time had been available and most of the defenses appeared insufficient anyway . . . that the witnesses were not shown to be unavailable, the cause was at issue and on the calendar awaiting trial, or that the case had been heard and determined on the merits before the war and only the entry of the judgment had been delayed because of some collateral point to be agreed upon or decided . . ."<sup>1</sup>

Sometimes the court, granting a stay, has given "liberty to apply"; or terms have been imposed.

Another learned writer observes :—

"The mere fact that a defendant is a non-resident alien enemy does not warrant the exercise of the court's discretion on his behalf. The court will determine upon the facts of each particular case whether a stay is necessary to protect the interests of the defendant enemy alien. This may sometimes be of great importance for the plaintiff."<sup>2</sup>

The impossibility of consultation between counsel and the defendant may be decisive. Again—

"inability to obtain witnesses for a trial, or impossibility of communication due to war-time difficulties may impose such hardship upon the defense of the case that it becomes necessary to stay further proceedings in the interest of a right administration of justice."<sup>3</sup>

##### 5. *Cannot Counter-claim ; may Set off*

An alien enemy defendant cannot counter-claim during the war ; he may, however, plead a set-off : *In re Stahlwerk Becker Aktiengesellschaft's Patent*.<sup>4</sup>

A respondent to a petition for the revocation of a patent may apply for leave to amend his specification by way of disclaimer ; he cannot make an "initiative" application. A set-off he may set up as a diminution of the claim : this is a defence which would not result in an order for the payment to him of any sum. But counter-claim he cannot : a counter-claim is "an affirmative and not a defensive proceeding" ; it may result in a larger sum being payable to the defendant than would be payable by him to the plaintiff.<sup>5</sup>

<sup>1</sup> Nusbaum, 43 Columbia L. Rev., 1061, 1062, citing the authorities

<sup>2</sup> Domke, 246 *et seq.*, citing numerous decisions of the Federal Courts and of the New York Supreme Court.

<sup>3</sup> *Ib.*, 251.

<sup>4</sup> [1917] 2 Ch. 272, 273, *per* Sargant, J., in argument.

<sup>5</sup> *Ib.*, at 276. See also *Robinson & Co. v. Continental Insurance Co. of Mannheim* [1915] 1 K.B., at 159, *per* Bailhache, J.

### 6. *No Third-party Proceedings*

An alien enemy defendant *cannot, during the war, take third-party proceedings*: *Halsey v. Lowenfeld* (*Leigh, Third Party*).<sup>1</sup>

A third-party claim is, in effect, a separate action by the defendant; in proceedings in the King's courts, an alien enemy cannot become an "actor."<sup>2</sup>

A lessee under a pre-war lease became, on the outbreak of war, an alien enemy; he remained liable for the rent accrued due during the war. If he assigned his lease with a covenant of indemnity against liability for rent, he could not, during the war, either by a third-party notice or otherwise, enforce his indemnity.

### 7. *No Execution of Judgment for Costs*

An alien enemy defendant who succeeds, or has succeeded, in an action, *cannot, during the war, execute a judgment for costs*: *The Robinson Case*.<sup>3</sup> "I do not think I ought to make any order, said Bailhache, J., "which would entitle the defendants to payment of costs until after the war . . . I think, however, the difficulty, if it arises, is sufficiently met by suspending the defendants' right to issue execution."

In *Birge-Forbes Co. v. Heye*<sup>4</sup> (heard by the Supreme Court of the United States), a cotton broker in Bremen had successfully before the war sued a cotton exporter in Texas to recover money paid. Before the Circuit Court of Appeals, defendant moved to dismiss or stay the action by reason of the declaration of war between the United States and Germany. The court affirmed the judgment, but ordered that the proceeds be paid to the clerk of the trial court and transmitted by him to the Alien Property Custodian. Holmes, J., said:—

"The plaintiff had got his judgment before war was declared, and the defendant, the petitioner, had delayed the collection of it by taking the case up. . . . There is nothing 'mysteriously noxious' . . . in a judgment for an alien enemy. Objection to it in these days goes only so far as it would give aid and comfort to the other side. Such aid and comfort were prevented by the provision that the sum recovered

<sup>1</sup> [1916] 2 K.B. 707, 714, *per* Lord Reading, C.J.

<sup>2</sup> See Judicature Act, 1873, s. 24 (3). For *actor*, see McNair, 43.

<sup>3</sup> [1915] 1 K.B. 155, 162.

<sup>4</sup> (1920), 251 U.S. 317, 323. Domke, 226, 223. Cited also by Black J., in *Ex parte Kumezo Kawato* (1942), 317 U.S. 69. *A.J.I.L.*, vol. 37 (1943), 336-341, at 339. Domke, 533, 536.

In *Lederer v. Kahn* (1943), 39 N.Y.S. (2d) 696, the New York Supreme Court permitted the Consul-General of Haiti, residing in Shanghai, Japanese-occupied territory, to sue for the conversion of a cheque, the proceeds of the judgment to be deposited with, and disposed of by, the Alien Property Custodian. This decision seems contrary to principle, as Domke points out (225, 226).



should be paid over to the Alien Property Custodian, and the judgment in this respect was correct."<sup>1</sup>

This dictum, with respect, does not represent the common law which imposes upon an alien enemy a personal and an absolute disability to proceed in the King's Courts. In *The Sovfracht Case*,<sup>2</sup> Lord Wright explained the limited application of this decision.

"The enemy was already on the record and all he needed was to defend the judgment which he had got. He was not an actor in the appeal. I venture, however, to think that the English law is correct in considering that the mere fact that any money received could not go out of the country until the end of the war does not exclude the rule forbidding to an enemy a right of suit. It is also clear that to an alien enemy a judgment is a more valuable security than a simple debt and may be valuable for purposes of increasing his credit even during the war."

#### 8. Courts (Emergency Powers) Act

The Courts (Emergency Powers) Act, 1914, s. 1 (7), deprived "subjects of a sovereign or State at war with His Majesty" of the protection afforded to other persons by the power to stay execution or to suspend the exercise of other remedies.

The Courts (Emergency Powers) Act, 1939, contained no such provision, nor is there any such provision in the Courts (Emergency Powers) Act, 1943. It is provided, by a Rule of Court, that the court or judge may *dispense with service* of any application under the Act on any defendant or respondent who is an enemy within the meaning of the Trading with the Enemy Act, 1939, as amended by or under any enactment.<sup>3</sup>

### IV. ALIEN ENEMY ON APPEAL

1. *Alien enemy defendant*.—A defendant against whom judgment has been given, has *the right of appeal*, even though, on the outbreak of war, he has become an alien enemy.<sup>4</sup>

By giving notice of appeal, in one sense he "initiates" the proceedings;

"but he is entitled to have his case decided according to law, and if the judge in one of the King's courts has erroneously

<sup>1</sup> Compare 1 Bacon's Abridgment, *Aliens, D*: "By the policy of the law, alien enemies shall not be admitted to actions to recover effects which may be carried out of the kingdom to weaken ourselves and enrich the enemy." (Cited by Nusbaum, 43 Columbia L. Rev., 1052, note 17.)

<sup>2</sup> [1943] A.C. 203, 236.

<sup>3</sup> The Courts (Emergency Powers) Rules, 1943 (S.R. & O., 1943, No. 1113), r. 22 (7). The author withdraws the opinion expressed in the *First Edition*, 60 (quoting Bailhache, J., in *Robinson's Case* [1915] 1 K.B. 155, 159), that, "in principle, an alien enemy defendant cannot seek the protection of the Act."

<sup>4</sup> *In re Merten's Patents, Porter v. Freudenberg* [1915] 1 K.B. 857.

adjudicated upon it he is entitled to have recourse to another and an appellate court to have the error rectified. Once he is cited to appear he is entitled to the same opportunities of challenging the correctness of the decision of the judge of first instance or other tribunal as any other defendant."<sup>1</sup>

An English company had presented a petition for the revocation of a patent granted to a German subject resident in Germany and belonging to a German company. Warrington, J., had ordered revocation; after the outbreak of war, notice of appeal was given. The respondents moved to set it aside on the ground that the appellants were alien enemies. The Court of Appeal held that the appellants were entitled not only to appear and be heard on the motion, but, notwithstanding the war, to have their appeal heard in the ordinary course.<sup>2</sup>

2. *Alien enemy plaintiff*.—A plaintiff against whom judgment has been given before the war, and who, upon the outbreak of war, becomes an alien enemy, "unless coming within the privileged exceptions" cannot present an appeal: *Porter v. Freudenberg*.<sup>3</sup>

"No distinction in principle" exists between an alien enemy who seeks the King's assistance to enforce a civil right in a court of first instance, and an alien enemy who seeks to enforce his right by recourse to the appellate courts:

"He is in either case seeking to enforce his right by invoking the assistance of the King in his courts. He is the 'actor' throughout. He is not brought to the courts at the suit of another, it is he who invokes their assistance . . ."<sup>4</sup>

If he gave notice of appeal before the war, the hearing of his appeal is suspended until peace. During the war he cannot be heard in any suit or proceeding in which "he is the person first setting the courts in motion."

## V. IN BANKRUPTCY PROCEEDINGS

1. *As creditor*.—An alien enemy, unless within the privileged exceptions,<sup>5</sup> cannot petition or prove for a debt: *In re Wilson and Wilson*.<sup>6</sup> Horridge, J., dismissed a motion, on behalf of a German resident in Cologne, to revise or vary the decision of the trustees who had rejected his proof.

<sup>1</sup> *Per* Lord Reading, C.J., at 883, 884 of [1915] 1 K.B.

<sup>2</sup> *Ib.*, at 891. Compare *Buxbaum v. Assicurazioni Generali and Kaplan v. Assicurazioni Generali* (1942), 34 N.Y.S. (2d) 480, 115, cited by Domke, 214, 215.

<sup>3</sup> [1915] 1 K.B. 857; and see McNair, 73.

<sup>4</sup> *Ib.*, at 884. See also *Aktiengesellschaft für Anilin Fabrikation, etc. v. Levinstein, Ltd.* [1915] W.N. 85, *per* Lord Cozens-Hardy, M.R.

<sup>5</sup> See *In re Hulcks* [1917] 1 K.B. 48, where an English company which merely did business in an enemy country through a properly appointed agent there, was not an alien enemy, and was therefore entitled to prove.

<sup>6</sup> (1915), 84 L.J.K.B. 1893.

2. *Claim for dividend; Right of proof surviving.*—An alien enemy may enter a claim for dividend arising out of a contract made during peace; his right of proof survives and may be exercised upon the restoration of peace: *Ex parte Boussemaker*.<sup>1</sup>

Lord Erskine, L.C., said:—

“It would be contrary to justice therefore to confiscate this dividend. Though the right to recover is suspended, that is no reason why the fund should be divided among the other creditors.”

“Let a claim be entered,” he ordered, “and the dividend be reserved.” “As the right to recover was only suspended”—Lord Reading, C.J., is explaining this case<sup>2</sup>—“that was not a reason why the fund available for the creditors should be divided among the other creditors without regard to the alien enemies’ suspended rights. He therefore ordered that a claim be entered and the dividend of the alien enemy be reserved . . . under these circumstances the Lord Chancellor admitted, not a proof, but a claim.”

And Lord Sumner observed: “There is all the difference between asking the court to grant you something better than you have got—namely, a judgment, which is the effect of suing on a simple contract—and calling the court’s attention to the fact that it has got hold of something which is yours already, and ought not to give it away behind your back.”<sup>3</sup>

3. *As debtor.*—An alien enemy debtor may be made bankrupt; he may apply for and obtain his discharge.<sup>4</sup> Both parts of this proposition follow from the reasoning of Lord Reading, C.J., in *Porter v. Freudenberg*.<sup>5</sup>

## VI. INTEREST, WHERE DEBTOR AND CREDITOR DIVIDED BY WAR

1. *The Rule.*—Interest will not run, subject to the exception below, where debtor and creditor are divided by “the line of war.”<sup>6</sup>

In *Du Belloix v. Lord Waterpark*,<sup>7</sup> where a promissory note was made abroad and the payee did not sue upon it until thirty years afterwards, Abbott, C.J., said:—

<sup>1</sup> (1806), 13 Ves. 71, 72.

<sup>2</sup> In *Porter v. Freudenberg* [1915] 1 K.B. 857, 873.

<sup>3</sup> *Rodriguez v. Speyer* [1919] A.C. 59, 129, 130.

<sup>4</sup> *McNair*, 73, citing *re Levy* (1915), *The Times*, 30th January.

<sup>5</sup> [1915] 1 K.B. at 881–884.

<sup>6</sup> *Pitt Cobbett*, 108; *McNair*, 105–107; *Trotter*, 92, 93. See also *Chadwick, Foreign Investments in Time of War* (1904), 20 L.Q.R. 167–187; *Gregory, Interest on Debts During War* (1909), 25 L.Q.R. 297–316. *McNair* (referring to the Treaty of Versailles, art. 296, annex, clause 22), points out that the treatment of interest in these cases will almost certainly be regulated by the Peace Treaty.

<sup>7</sup> (1822), 1 D. & R. 16, 19. See 25 L.Q.R. 302, 303.

"During the greater part of that time, he was an alien enemy, and could not have recovered even the principal in this country, and, at all events during that portion of the time the interest could not have run, and it would even have been illegal to pay the bill whilst the plaintiff was an alien enemy."

This dictum would *not apply* to a case in which there is a stipulation for interest or where a fiduciary relation exists on the dissolution of a partnership.<sup>1</sup>

In *In re Fried Krupp Aktiengesellschaft*,<sup>2</sup> a German ordinance cancelled interest on debts due to enemies of Germany. Younger, J., declined to give effect to this proclamation as "not conformable to the usage of nations"; he ordered the Custodian to pay interest on debts where interest was allowed.

In *Hugh Stevenson & Sons v. Aktiengesellschaft fur Cartonnagen-Industrie*,<sup>3</sup> an alien enemy partner was held entitled to a share of the profits accruing to the firm from the use of his capital during the war.

"It is difficult to see on what principle," remarked Lord Finlay, L.C., "the interest is to be forfeited if private property is to be respected."

2. *Reason of the rule.*—"Interest is payable 'for the forbearance of money,' whereas in time of war, payment cannot be exacted, and there is therefore no forbearance. But this will not apply where the debt is payable at a fixed date—as is usual in cases where the debt is secured by mortgage or other form of security—for in such a case interest is due not for forbearance but by virtue of the original agreement; although, even in this case, if the agreed date for payment of the principal should be reached during the war no further interest will be due."<sup>4</sup>

In *Hoare v. Allen*,<sup>5</sup> the Supreme Court of Pennsylvania held that a British subject, resident in London, could not claim interest on a mortgage for £16,000 given in 1773, in respect of the period of the American War of Independence, from 1775 until 1783.

"Interest is paid for the *use or forbearance* of money. But in the case before us there could be no forbearance; because the plaintiff could not enforce the payment of the principal . . . Where a person is prevented, by law, from paying the

<sup>1</sup> Per Lord Parmoor in *The Stevenson Case*, *infra* [1918] A.C. 239, 259, 260.

<sup>2</sup> [1916] 2 Ch. 194; [1917] 2 Ch. 188.

<sup>3</sup> [1918] A.C. 239, 245, and *per* Lord Parmoor, at 259. See Trotter, 93-95. It is submitted that interest on sums due to an enemy public trading corporation is not recoverable.

<sup>4</sup> 2 Pitt Cobbett, 108.

<sup>5</sup> (1789), 2 Dallas 102, 103. The cases are analysed in 25 L.Q.R., *supra*. See *Fowcroft v. Galloway* (1791), 2 Dallas 132.

principal, he should not be compelled to pay interest during the prohibition, as in the case of a garnishee, in a foreign attachment."

Thus, also, in *Brown v. Hiatts*,<sup>1</sup> B filed a bill against H, his wife, to foreclose a mortgage upon real property in Kansas, to secure a bond for \$2,400 with interest, and to obtain a sale. He was a citizen of Virginia (a Confederate State) and had lent the money in 1860. The Civil War lasted from 1861 to 1866. The bond did not mature till war began. During this period the parties were enemies. The present action was instituted in 1867; the relevant limitation period in Kansas was three years. The Supreme Court of the United States gave judgment for the amount due on the bond with interest till judgment, deducting the amount due for the period of the war. The statute of limitations did not run during the war, the court held: since contracts between enemies could not be enforced during such suspension, the running of interest ceased. Field, J., said:—

"Interest is the compensation allowed by law, or fixed by the parties, for the use or forbearance of money, or as damages for its detention, and it would be manifestly unjust to exact such compensation, or damages, when the payment of the principal debt was interdicted."

The learned judge declined to draw any distinction between contracts where interest was *stipulated* and those where interest *is allowed by law*. The court thought that—

"the stipulation for interest does not change the principle which suspends its running during war."<sup>2</sup>

3. *Exception to the rule*.—Despite the dicta in these two cases, it is submitted that the following exception to the rule exists.

"When interest is stipulated on an instrument until maturity, that interest should be payable in any event" upon the restoration of peace.<sup>3</sup>

Interest, in such a case, is the consideration, not for a forbearance to sue, but for the use of the money.<sup>4</sup> If the interest matures during the war, it would, at that point, cease.

Thus, interest on debentures redeemable at a fixed date from the date of issue, and interest on perpetual debenture stock, will probably continue to run during war.

American State courts have been divided.

<sup>1</sup> (1872), 15 Wallace 177, 185.

<sup>2</sup> *Ib.*, 186, citing Washington, J., in *Conn v. Penn* (1818), Peters Circuit Court, 524: "... whereas the law prohibits the payment of the principal, interest during the existence of the prohibition is not demandable." See 25 L.Q.R. 301, 302.

<sup>3</sup> Chadwick 20 L.Q.R. 169, 171, 172; 2 Pitt Cobbett, 108.

<sup>4</sup> 20 L.Q.R., 192.

In *Griffith v. Lovell*,<sup>1</sup> on the foreclosure of a deed of trust, where a subsequent purchaser claimed that interest on the debt secured was suspended during the Civil War while the parties were enemies, Dillon, C.J., said :—

“As the debtor had the use of the money, the creditor shall be allowed interest; indeed, as the interest is given by the contract, we do not see how the right to it can be denied, any more than the right to the principal.”

The court was equally divided, the other members holding that “as it is unlawful for the debtor to pay, he should not be chargeable with the interest.”

The latter view is found in a great number of American cases and is supported by a very learned writer.<sup>2</sup>

4. *Interest as damages*.—By the Law Reform (Miscellaneous Provisions) Act, 1934,<sup>3</sup> a court of record, in any proceedings to recover debt or damages, may order interest on the whole or any part of the period between the date when the cause of action arose and the date of the judgment. The section does not apply where interest is payable “as of right by virtue of any agreement or otherwise” nor does it affect the damages recoverable for the dishonour of a bill of exchange. This discretion will no doubt be exercised in suspending interest where parties are divided by the line of war.

## VII. OPERATION OF STATUTES OF LIMITATIONS

### 1. *Propositions Submitted*

(a) Where an alien enemy is the potential plaintiff, the period of limitation, *once it has begun to run, will continue to run against him*.<sup>4</sup> The statute makes no provision for *suspension* of time.

This section must now be read in the light of the Limitation (Enemies and War Prisoners) Act, 1945. (See Appendix.)

(b) *Where, at the date when the cause of action would otherwise have accrued, the potential plaintiff is an alien enemy, the period of limitation does not begin to run against him*.<sup>5</sup>

<sup>1</sup> (1868), 26 Ia, 226, cited at 25 L.Q.R., 306, 307.

<sup>2</sup> Gregory, 25 L.Q.R., 314, 315: “1. That interest ceases to run on obligations arising between debtors and creditors who are divided by the line of war, whether the obligations are express or implied due upon instruments under seal or otherwise.”

<sup>3</sup> Section 3 (1). Upon recovery of interest, see Bullen and Leake, 209-211.

<sup>4</sup> *Prideaux v. Webber* (1861), 1 Lev. 110; *The Bouring-Hanbury Case* [1943] 1 Ch. 104, 110. Preston & Newsom, *Limitation of Actions* (1943), 2nd ed., vii-ix, 5.

The Statute of Limitations does not apply in Prize but the court may not look with favour upon proceedings begun after an unreasonable time. See Colombos, *op. cit.*, s. 343: *The Wilhelmina* [1923] P. 112, 120, 121, and authorities cited.

<sup>5</sup> The author, on reconsideration, withdraws the opinion expressed in the *First Edition* (48) that in every case time runs against an alien enemy.

"A statute of limitation cannot begin to run unless there are two things present: a party capable of suing, and a party liable to be sued."<sup>1</sup>

"Now, . . . it cannot be said, that a cause of action exists, unless there be also a person in existence capable of suing."<sup>2</sup>

(c) Since an alien enemy is liable to be sued, *the period of limitation runs and continues to run against him.*<sup>3</sup>

## 2. English Authorities

(a) In *Prideaux v. Webber*<sup>4</sup> (arising out of the Civil War), to an action for trespass, battery and imprisonment, the defendant pleaded the Statute of Limitation. The plaintiff replied "That certain Rebels . . . had usurped the Government, and none of the King's Courts were open." The court adjudged for the defendant:

"And the Reason they gave that the Statute of Limitation was a good Bar (be it so, as it was pleaded, that the Courts were not open), was, Because there is not any Exception in the Act of such a Case; and Infants had been bound thereby if they had not been excepted."

(b) In *Lee v. Rogers*,<sup>5</sup> the reporter observes upon a case in the Common Pleas on a promise made in 1646. The defendant pleaded the statute; the defendant replied that until 1648 he was a Member of the House of Commons, "and that then the Government was usurped and no Courts erect." The plaintiff brought action as soon as the courts reopened on the Restoration.

"And on Demurrer it was adjudged (as I heard) . . . Thirdly, That Privilege of Parliament, nor the Courts being open, are not any Excuse against the Statute of Limitations, not being excepted out of the Statute . . ."

(c) In *Hall v. Wybourn*,<sup>6</sup> *Bynton's* case was quoted, where Bridgman, C.J., held that—

<sup>1</sup> *Thomson v. Clanmorris* (Lord) [1900] 1 Ch. 718, 728, 729, per Vaughan-Williams, L.J. *Preston & Newsom, op. cit.*, 3, 4.

<sup>2</sup> *Murray v. East India Company* (1821), 5 B. & Ald. 204, 214, 215, per Abbott, C.J. In an action by an administrator upon a bill of exchange, payable to the testator, but accepted after his death, time begins to run from the date of the grant of administration, not from the time the bills become due, there being no cause of action until there is a party capable of suing.

<sup>3</sup> *Preston & Newsom, op. cit.*, viii; *contra*, McNair, 81: "To penalize a person in this country for not suing to-day a person in Germany, Italy or Japan, would in many cases work grievous injustice, even if substituted service could be effected, when it is considered how frequently it is necessary for a plaintiff to obtain evidence from the country in which the defendant resides or carries on business." See *Battersby v. Anglo-American Oil Co., Ltd.* [1945] 1 K.B. 23, per Lord Goddard.

<sup>4</sup> (1861), 1 Lev. 31. Cited with approval by Lord Clauson in *The Bowring-Hanbury Case* [1943] Ch. 104, 110.

<sup>5</sup> 1 Lev. 110.

<sup>6</sup> (1690), 2 Salk. 420, cited with approval by Lord Clauson, *supra*.

"though the courts of justice were shut up so as no original could be filed, yet this statute would bar the action; because the statute is general, and must work upon all cases which are not exempted by the exception."

(d) In *Beekford v. Wade*,<sup>1</sup> Sir William Grant, M.R., declared:—

"General words in a statute must receive a general construction; unless you can find in the statute itself some ground for limiting and restraining their meaning by reasonable construction, and not by arbitrary addition or retrenchment." The true rule, he continues, is laid down by Sir Eardly Wilmot who mentions the Statute of Limitations "as an instance of a case, in which infants would be barred, if it were not for the introduction of the saving clause."

"A very strong case is put: that of the Courts of Justice being shut up in time of war; so that no original could be sued out; and yet it has been given as the opinion of learned judges, that even in that case the statute would continue to run."

After citing the decision of Bridgman, C.J., he says:—

"and in 10th Modern this resolution is said to have been often approved by Lord Chief Justice Holt. Here is a Statute which contains no exception whatever in favour of absentees: we are therefore of opinion, that it is impossible by construction to introduce that exception into the law."<sup>2</sup>

(e) In *De Wahl v. Braune*,<sup>3</sup> the wife of an alien enemy resident in Russia during the Crimean War, unsuccessfully claimed to sue in her own name upon a contract. The husband, it was argued, being an alien enemy, was *civiliter mortuus*. He must be joined in all actions after coverture, said Bramwell, B., *obiter*:

"It is sought to take this case out of that rule," he continued, "by saying that the husband cannot sue, but that is no answer. It may be that the effect would ultimately be to bar the action, by reason of the Statute of Limitations, but the inconvenient operation of that statute is no answer and does not take the case out of the general rule."

(f) In *Bowring-Hanbury's Trustee v. Bowring-Hanbury*,<sup>4</sup> a husband lent his wife £10,000 in 1924. In 1929 she repaid £1,000. She died in 1931. Her husband was appointed sole executor. In 1935 he was adjudicated bankrupt and the unpaid balance of the debt became vested in his trustee in bankruptcy,

<sup>1</sup> (1805), 17 Ves. Jur. 87, 91, 92, 93. The case cited is *Lord Buckinghamshire v. Drury*, Wilm., 177, 194.

<sup>2</sup> *Ib.*, 93, 94, referring to *Aubry v. Fortescue*, 10 Mod. 206.

<sup>3</sup> (1856), 25 L.J. Ex. 343, 345; See 1 Lindley, *Law of Companies*, 6th ed. (1902), 53, note (g); Pollock, *Law of Torts*, 14th ed. (F. A. Landon) (1939), 50, note (g).

<sup>4</sup> [1942] Ch. 276; [1943] Ch. 104, 110. *Seagram v. Knight* (1867), L.R. 2 Ch. 628, was distinguished.



who in 1936 issued a writ against him as executor, claiming £9,000. Bennett, J., held that neither a statement in an Inland Revenue affidavit (sworn to obtain probate), nor a note in a letter written to the trustee by the executor's solicitors, constituted an acknowledgment so as to prevent the debt from being barred. On appeal, the trustee took the additional point that the running of the Statute of Limitations was suspended from 1941 as long as the plaintiff and the defendant would be the same person—the creditor being the debtor's executor. Lord Clauson, after referring with approval to *Prideaux v. Webber*,<sup>1</sup> and the older authorities, said :—

“ This decision appears to have been based on the view that the words of the Act governed the matter, and that the absence of any exception in the Act of a space of time when no action could in fact be brought was fatal to the suggestion that such an exception existed.”

### 3. *Limitation Act, 1939*

The relevant statutes do not except an alien enemy. The Limitation Act, 1623, s. 7, specifies five cases of disability : being under twenty-one years, or a *feme covert*, or *non compos mentis*, or being imprisoned, or beyond the seas.<sup>2</sup> Section 7 is now confined to infants and lunatics.

On 1st July, 1940, the Limitation Act, 1939, came into operation.<sup>3</sup> The periods of limitation prescribed by this comprehensive statute are extended in cases of “ disability.”<sup>4</sup>

“ For the purposes of this Act, a person shall be deemed to be under a disability while he is an infant, or of unsound mind, or a convict subject to the operation of the Forfeiture Act, 1870, in whose case no administrator or curator has been appointed under that Act.”<sup>5</sup>

This definition would appear to be exhaustive.

For another reason it is submitted, both that the *statutory definition* is *exhaustive*, and that the relevant period of limitation continues to run against an alien enemy during war—subject to the statute confirming the Treaty of Peace.<sup>6</sup>

The Law Revision Committee, in their *Fifth Interim Report*, exhaustively considered whether the statutes and rules of law relating to the limitation of actions required amendment or

<sup>1</sup> (1661), 1 Lev. 31.

<sup>2</sup> See Chitty, *Law of Contracts*, 19th ed. (1937), 215, 216. Coverture, imprisonment and the absence of the plaintiff beyond the seas are no longer disabilities.

<sup>3</sup> Limitation Act, 1939, s. 34 (2).

<sup>4</sup> *Ib.*, s. 22.

<sup>5</sup> *Ib.*, s. 31 (2).

<sup>6</sup> The subject is now governed by the Limitation (Enemies and War Prisoners) Act, 1945 (see Appendix).

modification.<sup>1</sup> Their terms of reference were in the widest words: "the disabilities of plaintiffs, the circumstances affecting defendants which prevented the periods of limitation from beginning to run." The report contains detailed observations upon the disabilities found in the Statutes of Limitation and the differences between the divers statutory rules; it discusses absence beyond the seas, convicts under sentence of penal servitude, and diplomatic immunity; of alien enemies no word can be found.<sup>2</sup> The incapacity of an alien enemy to sue is an unqualified rule of "personal disability."<sup>3</sup> This is "a remarkable omission," if the rule is that time does not continue to run against an alien enemy during war, while his right of action is suspended.<sup>4</sup>

On the other hand, the strength of this argument (submitted in the *first edition*) has been somewhat affected by the decision in *The Fibrosa Case*.<sup>5</sup> It had previously been thought that "the mere fact that the doctrine . . . [*sc. in Chandler v. Webster*] was referred to the Law Revision Committee for consideration implies conviction in high quarters that the only way of getting rid of it was by legislation."<sup>6</sup> The House of Lords overruled part of the doctrine. Yet the two cases are not parallel: *the whole subject* of limitation—including *the disabilities* of plaintiffs—was referred to that committee.

#### 4. *The American Law*

The American view is that since an alien enemy is under a disability and cannot sue during war, the Statute of Limitation cannot run against him during war, but is "suspended": *Hanger v. Abbott*.<sup>7</sup>

The headnote is as follows:—

"The time during which the courts in the lately rebellious States were closed to citizens of the loyal States, is, in suits brought by them since, to be excluded from the computation of the time fixed by statutes of limitation within which suits may be brought; though exception for such cause be not provided for in the statutes."

<sup>1</sup> 1936, Cmd. 5334. And see p. 5, I. C.

<sup>2</sup> Pages 18–22; ss. 14–18; Recommendations (9), (10), (11), (12) and (20) at 42, 43.

<sup>3</sup> Coke in *Calvin's Case* (1608), 7 Rep. 17a. And see *per* Lord Sumner in *Rodriguez v. Speyer* [1919] A.C. 59, 108, 117, *supra*, 133.

<sup>4</sup> This argument, based upon the absence from the report of an authoritative committee, of a suggested rule of law, was used by the Court of Appeal, who held that there is no rule of common law that communications between husband and wife during marriage are privileged: *Shenton v. Tyler* [1939] Ch. 620, 628, *per* Sir Wilfrid Greene, M.R., and at 647, *per* Luxmoore, L.J. (Holdsworth's criticism, 56 L.Q.R. 139, does not affect the present argument.)

<sup>5</sup> [1943] A.C. 32.

<sup>6</sup> Professor P. H. Winfield (1941), 57 L.Q.R. 439, 440.

<sup>7</sup> (1867), 6 Wallace, 532, 539, 540. For a criticism of this case, see Preston and Newsom, *op. cit.*, viii, ix.

Clifford, J., traces the progressive relaxation of rules against alien enemies, and points out that the Act of 1623 was passed more than a century before it came to be understood that debts due to alien enemies were not subject to confiscation.

"Old decisions made when the rule of law was that war annulled all debts between the subjects of the belligerents, are entitled to but little weight, even if it is safe to assume that they are correctly reported, of which, in respect of the leading case of *Prideaux v. Webber*, 1 Lev. 31, there is much doubt."

Moreover, the parties in those cases were "citizens of the same jurisdiction"; most of the decisions were given before the rule became that war only *suspended* debts between enemies and peace restored the remedy. Plowden said that things "happening by an invincible necessity, though they be against common law or an Act of Parliament, shall not be prejudicial"; that the courts were shut, Clifford, J., continued, "is a good excuse on voucher of record."

"Peace," he continues, "restores the right and the remedy, and as that cannot be if the limitation continues to run during the period the creditor is rendered incapable to sue, it necessarily follows that the operation of the statute is also suspended during the said period."<sup>1</sup>

In *Brown v. Hiatts*,<sup>2</sup> it was held that the Statute of Limitations of Kansas did not run against the complainant during the Civil War. Field, J., declared:—

"Statutes of limitation . . . proceed upon the principle that the courts of the country where the person to be prosecuted resides, or the property to be reached is situated, are open during the prescribed period to the suitor. The principle of public law which closes the courts of a country to a public enemy during war renders compliance by him with such a statute impossible. As is well said in the recent case of *Semmes v. Hartford Insurance Co.*,<sup>3</sup> 'the law imposes the limitation and the law imposes the disability. It is nothing, therefore, but a necessary legal logic that the one period should be taken from the other.'"

Williston similarly states that war is excluded from the computation of the statute in a subsequent suit by a citizen of the country which was at war with the country of the forum.<sup>4</sup> He cites *Amy v. Watertown* (No. 2)<sup>5</sup>: "The general law operates as a qualification, or tacit condition of the particular statute." Three observations must be made. *First*, English Statutes

<sup>1</sup> (1867), 6 Wallace 542.

<sup>2</sup> (1872), 15 Wallace 177, 184, 185, *supra*, 176.

<sup>3</sup> 13 Wallace 158, 160, *per* Miller, J.

<sup>4</sup> *Law of Contracts* (1922), 2nd ed., vol. VI, s. 2013.

<sup>5</sup> (1889), 130 U.S. 320, 325, 326, *per* Bradley, J.

cannot fall into legal desuetude. *Secondly*, the modern rules are not in the Limitation Act, 1623, but in the Limitation Act, 1939; and this does not "suspend" the period of limitation once it has begun to run.

"The general rule is that the language of the Act must prevail, and no reasons based on apparent inconvenience or hardship can justify a departure from it."<sup>1</sup>

*Thirdly*, the dictum of Plowden quoted by Clifford, J., cannot be accepted as the modern law.

### 5. Sir Arnold McNair's View

International lawyers follow the American view.<sup>2</sup> Professor C. N. Gregory deduced from the American decisions the following principles. The Statute of Limitations will not run, he submits—

"(1) when the parties are so divided by the line of war that the plaintiff cannot have access to the court;

(2) when the court to which the plaintiff has a right to have recourse does not sit on account of the disorder of war."<sup>3</sup>

Sir Arnold McNair, founding also on the cases decided in the United States during the War of 1914, comes to the same conclusion.<sup>4</sup> Statutory disabilities, he maintains, are curable; an alien enemy has no "*persona standi in judicio*."

<sup>1</sup> (1880), 130 U.S., at 324.

<sup>2</sup> Phillipson, *op. cit.*, 74, 76; Pitt Cobbett, *op. cit.*, 108, note (a), 117; Trotter, 87-90; Chadwick (1904), 20 L.Q.R. 168, 169.

<sup>3</sup> Gregory, *The Effect of War on the Operation of Statutes of Limitation* (1914), 28 Harv. L. Rev. 673-682, at 681, 682.

<sup>4</sup> McNair, 74-81.

A. Upon *pre-war causes of action*, he refers to—

1. *Inland Steel Co. v. Jelleovic* (1926), 150 North Eastern Reporter (Indiana); Annual Digest, 1925-26, Case No. 343: a claim for workmen's compensation, where the deceased lost his life in 1917 and the defendants filed their claim in 1923, within two years of the official end of the war between the United States and Austria-Hungary.

2. *Nathan v. Equitable Trust Co.* (1929), 250 N.Y. 250 (New York Court of Appeals); Annual Digest, 1929-30, Case No. 285. The New York Civil Practice Act *specifically provided* that, during war, time does not run against an alien enemy plaintiff or defendant and that (by s. 28), "Disability must exist when right accrues. A person cannot avail himself of a disability unless it existed when his right of action or of entry accrued." It was held that where a cause of action accrued in March, 1917, and the plaintiff sued in 1927 within six years of the official end of the war between the United States and Germany (which lasted from April, 1917, until June, 1921), the period of the war could not be deducted. Delivering the opinion of the court (including Cardozo and Lehman, JJ.), O'Brien, J., said: "Unless plain language be disregarded, s. 28 must be held to apply to every disability defined in the Civil Practice Act and necessarily includes the one resulting from a state of war as those arising from infancy, insanity or imprisonment. . . . If the cause of action accrued during belligerency, the later duration of the war is to be deducted. When the right to sue existed before the war, no

"He is outside the protection of the King and, we suggest, outside the scope of any statute of limitation. He is off the legal map so far as enforcing rights are concerned. How then can periods for the limitation of action run against him?"<sup>1</sup>

Sir Arnold submits that the effect of the outbreak of war is "to suspend the running of statutes of limitation, whether they have already begun to run or not"; to allow the right of an alien enemy to perish, "comes very near to confiscation of his property, which can only be done by 'inquisition of office' or by legislation."<sup>2</sup> This also applies to claims *against* an alien enemy defendant.<sup>3</sup>

The author respectfully agrees that since, during war, an alien enemy is incapable of suing, no cause of action can accrue to him and therefore, that *time cannot begin to run against him*. But how can one read into the statute a *suspension* of the period of limitation when it has already begun to run? Would not the court then make the law instead of administering it?<sup>4</sup>

#### 6. Under Treaty of Versailles

By the Treaty of Versailles which received the force of law by the Treaty of Peace Act, 1919, and the relative Orders in Council:—

"All periods of prescription, or limitation of right of action, whether they began to run before or after the outbreak of war, shall be treated in the territory of the High Contracting Parties so far as regards relations between enemies as having been suspended for the duration of the war. They shall begin to run again at earliest three months after the coming into force of the present Treaty. This provision shall apply to the period prescribed for the presentation of interest or dividend coupons or for the presentation for repayment of

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more extensive privilege is accorded an alien enemy than an infant, a prisoner or an insane person."

B. Upon causes of action accruing during the war, he refers to—

1. *Sipiyak v. Davis* (1923), 226 Pa. St. 49 (Pennsylvania); Annual Digest, 1923-24, Case No. 224. The deceased died of an industrial injury in 1919; the claim was made in 1921 by his widow, an Austrian living in Austria. A claim must be filed within one year after death. The Peace Treaty was concluded in 1921 and the claim was filed two years after the death, but within one year of the Treaty. The court followed *Hanger v. Abbott*, 73 U.S. 532.

2. *Industrial Commission of Ohio v. Rotar* (1931), 124 Ohio 418; Annual Digest, 1931-32, Case No. 226. A claim for workmen's compensation filed more than two years after death, but within two years of the end of the war with Austria, was not barred.

<sup>1</sup> *McNair*, 78.

<sup>2</sup> *Ib.*, 80.

<sup>3</sup> *Ib.*, 80, 81.

<sup>4</sup> *Amy v. Watertown* (No. 2) (1889), 130 U.S. 320, 324, *per* Bradley, J.

securities drawn for repayment or repayable on any other ground." (Art. 300 (a) ; See Cmd. 6591, para. 9.)

### *Postscript*

Since this chapter was in page proof, the *Report of the Committee on Limitation of Actions and Bills of Exchange* (of which W. L. McNair, K.C., was chairman) has been published (1945, Cmd. 6591). This appears to confirm the propositions submitted in the text, by the author.

Based upon this report, the *Limitation (Enemies and War Prisoners) Bill* was introduced into the House of Lords. (*Official Report, House of Lords*, vol. 134, No. 14, 23rd January, 1945, cols. 630-633 ; *House of Commons*, vol. 407, No. 30, 9th February, 1945, cols. 2397-2404.)

The Report observes :—

" It may well be that a distinction must be drawn between causes of action which have accrued before and after the outbreak of war. But in the absence of judicial interpretation of the very precise words of the Act, we consider that, if as a matter of policy it is decided that the suspension should be the general rule, express statutory provision should be made to that effect." (Cmd. 6591, para. 7.)

The committee recommended (para. 27) :—

1. That in a cause of action to which one party has been a statutory enemy, or a prisoner of war or a civilian internee in enemy or enemy-occupied territory, the periods of limitation should be *suspended* while the party was an enemy or prisoner or internee *and for twelve months* after ceasing to be an enemy or prisoner or internee or after new legislation, whichever be the later (see para. 20).

2. That territory should be treated as enemy territory as long as any provisions of the Act of 1939 applied to it (see para. 17).

3. That an enemy shall *prima facie* be deemed to have continued as such until the territory ceased to be treated as enemy territory (see para. 16).

4. That otherwise there should be *no general suspension* of periods of limitation (see para. 25).

5. That no amendment should be made to the *Bills of Exchange Act*, 1882 (see para. 26).

The committee annexed a set of *Draft Clauses* which the Bill broadly follows.

# CHAPTER V

## CONTRACTS WITH ENEMY

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### A. AT COMMON LAW

#### I. EXECUTORY CONTRACTS; RULE OF ABROGATION

##### 1. *Contracts requiring Intercourse with Enemy, Abrogated*

"A STATE of war between this kingdom and another country abrogates and puts an end to all executory contracts which for their

further performance require, as it is often phrased, commercial intercourse between the one contracting party, subject to the King, and the other contracting party, an alien enemy, or anyone voluntarily residing in an enemy country . . . I think the word 'intercourse' is sufficient without the word 'commercial'": *Ertel Bieber & Co. v. Rio Tinto Co.*<sup>1</sup>

This prohibition of "intercourse" is not confined to commercial or trading intercourse.<sup>2</sup>

"No intercourse with an alien enemy should take place unless by permission of the State."<sup>3</sup>

Not all contracts between those under the King's Peace and alien enemies are dissolved, but only such contracts as require intercourse with the enemy or are contrary to public policy.

Lord Dunedin<sup>4</sup> thus states the principle:—

"Upon the ground of public policy the continued existence of contractual relations between subjects and alien enemies, or persons voluntarily residing in the enemy country which (1) gives opportunities for the conveyance of information which may hurt the conduct of the war, or (2) may tend to increase the resources of the enemy or cripple the resources of the King's subjects, is obnoxious and prohibited by our law."<sup>5</sup>

An executory contract, to be abrogated, either must involve intercourse with the enemy or must be contrary to public policy.<sup>6</sup> At common law, trading with the enemy is unlawful; its tendency is to enhance the resources of the enemy or to cripple those of the subjects of the King.<sup>7</sup> To keep alive an executory contract with an enemy—

"hampers the trade of the British subject, and through him the resources of the kingdom. For he cannot, in view of the certainly impending liability to deliver (for the war cannot last for ever), have a free hand as he otherwise would. He must either keep a certain large stock undisposed of, or, if he sells the whole of the present stock, he cannot sell forward, as he would be able to do if he had not the large demand under the contract impending. It increases the resources of the enemy

<sup>1</sup> [1918] A.C. 260, at 267, 268, per Lord Dunedin. See *McNair*, 82-121.

<sup>2</sup> *Diamond, The Effect of War on Pre-existing Contracts Involving Enemy Nationals* (1944), 53 Yale L.J. 700-720, for English and American cases, and for the differences. *Suspension*, in the United States, is the general rule.

<sup>3</sup> *Robson v. Premier Oil & Pipe Line Co., Ltd.* [1915] 2 Ch. 124, 135.

<sup>4</sup> *Tingley v. Müller* [1917] 2 Ch. 144, 171, per Scrutton, L.J.

<sup>5</sup> [1918] A.C., reviewing authorities at 268-271. He approved *Zinc Corporation v. Hirsch* [1916] 1 K.B. 541 (C.A.).

<sup>6</sup> *Id.*, at 274. See *Effect of War on Contracts* (1917), 31 Harv. L. Rev., 640-643.

<sup>7</sup> *Id.*, at 274.

<sup>8</sup> *Id.*, at 273. See *The Hoop* (1799), 1 C. Rob. 196, per Sir W. Scott; *Furtado v. Rogers* (1802), 3 Bos. & P. 191, 198, 199, per Lord Alvanley.



for if the enemy knows that he is contractually sure of getting the supply as soon as war is over, that not only allows him to denude himself of present stocks, but it represents a present value which may be realised by means of assignation to neutral countries."<sup>1</sup>

The illegality of *communication* with the enemy does not depend upon its triviality, nor does the illegality of *trading* with the enemy depend upon whether it is profitable, or otherwise.<sup>2</sup>

## 2. "Landmarks of the Law"

The three "landmarks of the law," said Lord Dunedin, were in the judgment of Lord Stowell in *The Hoop*<sup>3</sup> in 1799; in Lord Alvanley's judgment in 1802 in *Furtado v. Rogers*<sup>4</sup>; and "still more explicitly" in the judgment of the Queen's Bench in 1857 in *Esposito v. Bowden*.<sup>5</sup>

(a) In *The Hoop*,<sup>6</sup> Sir William Scott declared:—

"... there exists such a general rule in the maritime jurisprudence of this country, by which all trading with the public enemy, unless with the permission of the sovereign, is interdicted. It is not a principle peculiar to the maritime law of this country; it is laid down by *Bynkershoek* as an universal principle of law: *ex natura belli commercia inter hostes cessare non est dubitandum*. In my opinion no principle ought to be held more sacred than that this intercourse cannot subsist on any other footing than that of direct permission of the State."

Referring to another principle of law, "of a less politic nature, but equally general in its reception and direct in its application": the disability of an alien enemy to sue, he continues:—

"A State in which contracts cannot be enforced, cannot be a state of legal commerce. If the parties who are to contract have no right to compel the performance of the contract, nor even to appear in a court of justice for that purpose, can there be a stronger proof that the law imposes a legal disability to contract? To such transactions it gives no sanction; they have no legal existence; and the value of such commerce is attempted without its protection and against its authority."

(b) In *Furtado v. Rogers*<sup>7</sup> an insurance effected in Great Britain in 1792 on a French ship before the war between England

<sup>1</sup> [1918] A.C., at 275, per Lord Dunedin.

<sup>2</sup> *Ib.*, 276, 277, per Lord Atkinson. See (1944), 61 South African L.J., 533.

<sup>3</sup> (1799), 1 C. Rob. 196.

<sup>4</sup> (1802), 3 Bos. & P. 191.

<sup>5</sup> (1857), 7 E. & B. 763.

<sup>6</sup> (1799), 1 C. Rob. 196, 198, 200, 201.

See J. Dundas White, *Trading with the Enemy* (1900), 16 L.Q.R. 397-413.

<sup>7</sup> (1802), 3 Bos. & P. 191, 198, 199, 200.

and France (which began in February, 1793), did not cover a loss by British capture at Martinique in 1793. The plaintiff was French and lived at Bayonne. In 1796 a royal licence was granted to Messrs. A. R. & Co. authorising them to receive from the underwriters the money for which they had subscribed; the action was brought upon the directions of Messrs. A. R. & Co.

To insure enemies' property is, at common law, illegal, Lord Alvanley held; a contract made before the war is equally unavailable, since it is equally injurious to the interests of the country.

All "commercial intercourse with the enemy" is illegal at common law; insurances founded upon such intercourse are also illegal. "For it being determined that during war all commercial intercourse with the enemy is illegal at common law, it follows that whatever contract tends to protect the enemy's property from the calamities of war, though effected antecedent to the war, is nevertheless illegal."

(c) In *Esposito v. Bowden*<sup>1</sup> a Neapolitan shipowner, then in a British port, agreed with the defendant, a British subject, in 1853 to take his Neapolitan ship the *Marie Christina* from the Tyne to Naples and, after discharging the cargo, to proceed to Odessa, load a cargo of grain and to proceed to Falmouth, act of God, the Queen's enemies and all accidents of the seas excepted, with usual provisions as to laying days and demurrage. The cargo was not loaded and the ship was detained on demurrage above the laying days, but the defendant declined to pay demurrage. He pleaded that before cargo was provided, in 1854 the Queen declared war against the Emperor of Russia, and that Odessa had since been a hostile port. It had become impossible to perform his agreement without trading with the enemy; the charterparty was rescinded.

The Court of Exchequer Chamber held that shipment from an enemy port, even in a neutral vessel, involved trading with the enemy. Willes, J., declared:—

"It is now fully established that, the presumed object of war being as much to cripple the enemy's commerce as to capture his property, a declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country, and that such intercourse, except with the licence of the Crown, is illegal."<sup>2</sup>

<sup>1</sup> (1857), 7 E. & B. 763.

<sup>2</sup> *Ib.*, 779. Upon the prohibition of "correspondence," see *per* Bailhache, J., in *Mitsui v. Mumford* [1915] 2 K.B. 27, 33: "a person, a subject of a friendly Power, who at the beginning of the war traded here and at Antwerp, cannot write and send a business letter from this country giving instructions to his Antwerp agent as to his business there." He cites *The Rapid* (1814), 8 Cranch, 155, 162, 163, where it was held that an American citizen could not lawfully send a ship to bring from England goods bought before the war. Johnson, J., delivering the opinion of the court (including Marshall, C.J., and Story, J.), said: "But the

The decision in *Potts v. Bell*<sup>1</sup> and the "great case of *The Hoop*"<sup>2</sup> restored the rule that—

"one of the consequences of war is the absolute interdiction of all commercial intercourse or correspondence between subjects of the hostile countries except by the permission of their respective Sovereigns."<sup>3</sup>

It is illegal, without licence, to bring from an enemy port, even in a neutral ship, goods bought in the enemy's country after the outbreak of war, even if they were not bought from the enemy: "trading with the inhabitants of an enemy's country is trading with the enemy."<sup>4</sup> The effect of a declaration of war is equal to the effect of an Act of Parliament prohibiting "intercourse with the enemy except by the Queen's licence."<sup>5</sup>

A contract of affreightment made before war and unexecuted when war is declared, if the further execution becomes "unlawful or impossible," is dissolved and both parties are absolved from further performance.<sup>6</sup> Further, the removal of merchandise, after knowledge of the war, without a royal licence, even though acquired before the war from the enemy's country, is generally illegal.<sup>7</sup> The court concurred with the decision in *Reid v. Hoskins*,<sup>8</sup> where it was held that (the shipowners being British) the master's duty was to leave Odessa. The more convenient course, continued Willes, J., is that "both should be at once absolved, so that each, on becoming aware of the fact of a war, the end of which cannot be foreseen, making the voyage or the shipment presumably illegal for an indefinite period, may at once be at liberty to engage in another adventure without waiting for the bare possibility of the war coming to an end in sufficient time to allow of the contract being fulfilled, or some

object, policy and spirit of the rule is to cut off all communication or actual locomotive intercourse between individuals of the belligerent States. Negotiation or contract has, therefore, no necessary connection with the offence. *Intercourse inconsistent with actual hostility* is the offence against which the operation of the rule is directed; and by substituting this definition for that of *trading with an enemy* an answer is given to this argument."

<sup>1</sup> (1800), 8 T.R. 548.

<sup>2</sup> (1799), 1 C. Rob. 196.

<sup>3</sup> 7 E. & B., at 789, 780. As Scrutton, L.J., points out in *Tingley v. Muller* [1917] 2 Ch. 144, 170, at common law, owing to Lord Mansfield's attitude to insurances, the law had been uncertain: *Gist v. Mason* (1786), 1 T.R. 84, per Lord Mansfield; *Bell v. Gilson* (1798), 1 Bos. & P. 345, 354, per Buller, J.

<sup>4</sup> 7 E. & B., at 780.

<sup>5</sup> *Id.*, 781.

<sup>6</sup> *Id.*, 783. Willes, J., cites Kent, *Commentaries*, 3rd vol., p. 248 (4th ed.), and his decision in *Griswold v. Waddington*, 16 John. 438, that a partnership with a foreigner was dissolved upon war between the two countries.

<sup>7</sup> *Id.*, 785. *Semble*, even without knowledge of the war.

<sup>8</sup> 4 E. & B. 979; 5 E. & B. 729.

other opportunity of lawfully performing the contract perchance arising."<sup>1</sup> Hence the origin of the rule as to war "at once working an absolute dissolution."

"... for a *British* subject (not domiciled in a neutral country . . .) to ship a cargo from an enemy's port even in a neutral vessel, without licence, is an act *prima facie* and under all ordinary circumstances a dealing and trading with the enemy, and therefore forbidden by law."<sup>2</sup>

### 3. *Suspensory Clause, Illegal*

(a) A clause *suspending* the performance of *such a contract* in the event of war, which would keep the contract alive and allow the enemy to realise its value by assignments to neutrals, is *contrary to public policy, illegal and void*: *Ertel Bieber Case*.<sup>3</sup>

Large quantities of cupreous ore were to be shipped by instalments during several years by an English company in Spain to three German companies. The contracts contained a "suspensory clause" in the event of "strikes, war, or any other cause over which the sellers have no control"; the obligation to ship and/or deliver should be suspended during the continuance of the impediment and for a reasonable time thereafter. There was a corresponding provision in favour of the buyers. The buyers had a yearly duty to declare quantities; and there was an arbitration clause. Upon the outbreak of war one contract had been almost performed; no deliveries had begun under the second contract, which was intended to be performed from 1915 to 1919. These contracts, involving trading with the enemy, were, upon the outbreak of war,

<sup>1</sup> 7 E. & B. 792.

<sup>2</sup> *Ib.*, 793. Lord Reading, C.J., in *Porter v. Freudenberg* [1915] 1 K.B. 857, 867, 868, said that the law against trading with the enemy was founded upon the conception that subjects of the Crown were at war with subjects of the States at war with the Crown. "... later it was grounded upon public policy, which forbids the doing of acts that will be or may be to the advantage of the enemy State by increasing its capacity for prolonging hostilities in adding to the credit, money or goods, or other resources available to individuals in the enemy State." Trading with a British or a neutral subject trading in the hostile territory is as much assistance to the enemy as if he were a subject of the enemy State.

Baty, examining the English and American cases on *Intercourse with Alien Enemies* in (1915), 31 L.Q.R. 30-49, comes to the conclusion that the real ground of prohibition is not the augmentation of the enemy's resources (which is not prominent until 1854), but "the supposed dangers of intercourse alone" (44).

Those contracts, he says, which involve no intimate intercourse, are merely suspended (43). The rule of dissolution and invalidity is derived from "the danger and impossibility of permitting intimate intercourse between the subjects of enemy States" and not from "any abstract theory of individual hostility," nor from "any imagined benefits of suppressing the enemy's trade" (49). Dr. Baty thought that the prohibition was no longer "reasonable." These words were written early in the first World War and before Lord Sumner's speech in the *Ertel Bieber Case* [1918] A.C. 260, 284-292, 238.

<sup>3</sup> [1918] A.C. 260.

abrogated. The suspensory clause, even if it applied to a war between the countries of the parties, was contrary to public policy and void. Two of the contracts were in German form; the question whether they were void was to be determined by English, not by German, law.<sup>1</sup>

Lord Sumner said :—

“Secondly, the court decided in express terms that illegality does not suspend; it dissolves. What the law forbids is impossible of performance to those who owe obedience to that law, and this higher public obligation discharges any private obligation to the contrary.”<sup>2</sup>

A subject may not provide by stipulation that a contract which the law dissolves should be suspended.<sup>3</sup>

“... if upon public grounds on the outbreak of war,” Lord Sumner asks, “the law interferes with private executory contracts by dissolving them, how can it be open to a subject for his private advantage to withdraw his contract from the operation of the law and to claim to do what the law rejects, merely to suspend where the law dissolves? The prohibition, which arises at common law on the outbreak of war, has for this purpose the effect of a statute.”<sup>3</sup>

The courts, he reasons, “could not have adopted the rule of dissolution unless they had reasoned that suspension would be inconsistent with this principle of the law of contract.”<sup>4</sup> After quoting the language of Willes, J., in *Esposito v. Bowden*,<sup>5</sup> he continues :—

“To his mind I think it is clear that the rule was one made to provide certainty at the outbreak of war, where in itself everything is uncertain; that it was one made to apply generally, . . . ; and that, for the purpose of applying it, the case must be looked at as things stood when war broke out.

<sup>1</sup> “Where a contract conflicts with what are deemed in England to be essential public or moral interests, it cannot be enforced here notwithstanding that it may have been valid by its proper law”: Westlake, *Private International Law*, 4th ed., s. 215, cited by Lord Parker at [1918] A.C. 302.

<sup>2</sup> [1918] A.C., at 285, stating the effect of *Esposito v. Bowden*, *supra*. See the statement of the principle (at 281) by Lord Parker. He thought (at 283) that the contract was frustrated on the principle of *The Metropolitan Water Board Case* [1918] A.C. 119. But he questioned whether a contract for the sale of goods for delivery at a future date was abrogated if the war begins and ends between the date of contract and the date for delivery. The material date must surely be the date when war begins; if, on that date, the contract has become unlawful, it cannot be revived if the war ends before performance should have taken place. See Lord Sumner's speech at 287, 288. See McNair, 27 *Grotius*, 190, 191. See also *In re Badische Co., Ltd.* [1921] 2 Ch. 331, 372, *per Russell, J.*

<sup>3</sup> [1918] A.C., at 286.

<sup>4</sup> *Ib.*, 287.

<sup>5</sup> 7 E. & B. 763, 792.

and not as they were ascertained to be or as they ultimately happened during the interval before the trial of the action."<sup>1</sup>

The rule of dissolution "sets the public welfare above private bargain." It does so for the safety of the State in the twofold aspect of enhancing the nation's resources and crippling those of the enemy.

"To hold that the parties may be allowed to make their own arrangements for attaining these ends and to set their private judgment, not untinged by considerations of their future interest, above the prescriptions of the public law would be erroneous."<sup>2</sup>

That the present contracts provided for a series of shipments and for delivery by instalments was immaterial: "The whole contract so far as it is mutually executory is dissolved."<sup>3</sup> Dissolution was not prevented by "special stipulations between the parties."

"The class affected is not such contracts as contemplate a continuance of trading during war, but trading contracts as such, which are in being as mutually executory contracts at the outbreak of war, and would in ordinary course and circumstances import commercial intercourse."<sup>3</sup>

Such suspension clauses as were in question in the present case tended to defeat the successful conduct of the war.<sup>4</sup> If, on the other hand, by dissolution of executory trading contracts, more profits might be lost by British than by enemy subjects, this was a matter that a court of law was not competent to inquire into or decide. "It is for the executive to investigate and for the Legislature to provide for such possibilities."<sup>5</sup>

(b) The same result was independently reached by McCardie, J., in *Naylor, Benzon & Co. v. Krainische Industrie Gesellschaft*.<sup>6</sup> By a contract made in 1912 a British firm agreed to sell and an Austrian firm to buy, iron ore, c.i.f. to Servola, near Trieste, cash on receipt of invoice for shipment; delivery in equal quantities over two years; shipments at regular intervals as could be arranged. A suspension clause provided that in case of stoppage of mines or works, or loss or delay during transit

<sup>1</sup> [1918] A.C., at 287, 288.

<sup>2</sup> *Ib.*, 288.

<sup>3</sup> *Ib.*, 289.

<sup>4</sup> *Ib.*, 290.

<sup>5</sup> *Ib.*, 291. The *Ertel Bieber Case* was followed in *Fried Krupp Aktiengesellschaft v. Orconera Iron Ore Co., Ltd* (1919), 84 L.J. Ch. 304 (H.L.). A contract, having a duration of ninety-nine years, provided that it should be suspended during any period in which an "unavoidable cause" prevented the delivery or receipt of ore and should revive on the cessation or removal of such cause. The argument that this contract was a "concomitant of the rights of property" (Lord Finlay *dubitante*) was rejected.

<sup>6</sup> [1918] 1 K.B. 331. An appeal was dismissed, Pickford, L.J., saying that after the *Ertel Bieber Case*, this case was unarguable: [1918] 2 K.B. 486, 487.

owing to accidents, strikes, lockouts, wars, dangers of the sea, or any other cause beyond the parties' control, deliveries might be wholly or partially suspended by sellers or buyers during the continuance of the cause. Disputes arising out of the contract should be referred to London. When part of the ore had been delivered, war was declared.

After a comprehensive review of the authorities, McCardie, J., held that—

- (1) the contract was dissolved upon the outbreak of war ;
- (2) the suspension clause was immaterial, for the present war was not within the wars contemplated in the clause, and that even if it were, delivery only was postponed, but the other terms of the contract, including arbitration, remained in force during the war ;

- (3) the contract was dissolved through the frustration of the commercial adventure and on grounds of public policy.

But for the suspension clause, he said, the case was clear : "Dissolution takes place irrespective of business loss or gain."<sup>1</sup> The contract contemplated a continuance of intercourse between the parties after the outbreak of war : "arbitration cannot take place without intercommunication and the transmission of notices between the parties."<sup>2</sup> Moreover, "to maintain the contract during the war will support the enemy during the war."<sup>3</sup>

(c) McCardie, J., followed the decision of Rowlatt, J., in *The Clapham Steamship Case*.<sup>4</sup> A charterparty made in 1913 for five years by the owners of a British steamship with a Dutch company whose shares were held by Germans, contained a suspension clause giving either party the option to suspend the charter during hostilities between the nation of the flag and any European power. Upon the outbreak of war it was dissolved not merely suspended. The maintenance of the charterparty in a state of suspension supports the enemy *during* the war. The enemy is able, by his prospects of shipping facilities, to keep his connection with neutral or enemy merchants overseas, or even to enter *de praesenti* into new contracts to be performed when peace comes. This might prolong the war ; the enemy can fully commit his own shipping during the war, while the adversary must not commit *his* shipping, lest, when peace comes, he is in breach.<sup>5</sup>

<sup>1</sup> [1918] 1 K.B., at 334.

<sup>2</sup> *Ib.*, 337.

<sup>3</sup> *Ib.*, 345. For the various meanings of "suspend," see 388. See also Trading with the Enemy Act, 1939, s. 1 (2) (a) (iii).

<sup>4</sup> [1917] 2 K.B. 639.

<sup>5</sup> *Ib.*, 645, 646. See also, *In re Badische Co., Ltd.* [1921] 2 Ch. 371, 381, *per* Russell, J. On "suspension" generally, see McNair, 98, 99. In *Distington Hematite Iron Co., Ltd. v. Possehl & Co.* [1916] 1 K.B. 811, 814, Rowlatt, J., accepted the view that "an executory contract is suspended, as opposed to dissolved, only when the suspension does not involve the making of a different contract between the parties." *Sed quare*.

(d) In *The Fibrosa Case* decided during the present war,<sup>1</sup> where, before the war, an English company had agreed to sell to a Polish company with the intention of erecting in Gdynia in Poland textile machinery, subject, *inter alia*, to the following condition: "Should dispatch be hindered or delayed by . . . any cause beyond our reasonable control including . . . war . . . a reasonable extension of time shall be granted," "the ambit of the express condition," said Viscount Simon, L.C., "is limited to delay in respect of which a reasonable extension of time" might be granted.

"That might mean a minor delay as distinguished from a prolonged and an indefinite interruption of prompt contractual performance which the present war manifestly and inevitably brings about."

The principle, he continued, is that

"Where supervening events, not due to the default of either party, render the performance of a contract indefinitely impossible, and there is no undertaking to be bound in any event, frustration ensues, even though the parties may have expressly provided for the case of a limited interruption."

#### 4. Effects of Abrogation

(a) " . . . if the contract in the ordinary course of performance, or the settlement of disputes would require any intercourse at all after the outbreak of war, then the contract is dissolved, not only as to future acts of performance, but absolutely and *in toto* as to all future rights, duties and obligations."<sup>2</sup>

(b) " . . . any debt or cause of action which accrued to the enemy before the war will remain to him, subject to the effect of the Trading with the Enemy Acts and the vesting of such a chose in action in the Public Trustee. The dissolution of the contract leaves such debts and causes of action as they existed at the outbreak of war."<sup>3</sup>

(c) If the contract became abrogated *before 1st July, 1943*, and money has been paid in advance under the contract, the consideration for which was *entire* and has *wholly failed*, then,

<sup>1</sup> [1943] A.C. 32, 40, approving, on this point, the view of the Court of Appeal: [1942] 1 K.B. 12, 26, *per* MacKinnon, L.J., and authorities there cited.

<sup>2</sup> *The Naylor Benzon Case* [1918] 1 K.B. 331, 337, *per* McCardie, J.

<sup>3</sup> *Ib.*, 345. "Accrued rights are not affected, though the right of suing in respect thereof is suspended": *per* Lord Dunedin in *The Ertel Bieber Case* [1918] A.C. 260, 269. In *Penney v. Clyde Shipbuilding & Engineering Co., Ltd.* [1919] S.C. 363, 375, 376, *per* the Lord President Strathclyde, it was held that at the outbreak of war, the property in an unfinished ship—subsequently requisitioned—had passed to enemy purchasers, and that a sum of £79,732, which they had paid on account of the price, was a *surrogatum* for its value, and fell to be paid to the Custodian, who was entitled to interest only from the date of the interlocutor.



in the absence of an express provision or custom to the contrary, the money may be recovered.<sup>1</sup>

"A partial failure of consideration gives rise to no claim for recovery of part of what has been paid."<sup>2</sup>

(d) If the contract became abrogated *on or after 1st July, 1943*, then, whether the consideration has wholly or partially failed, and in the absence of any provision in the contract to the contrary, *the rights and liabilities of the parties will be adjusted under the Law Reform (Frustrated Contracts) Act, 1943.*<sup>3</sup>

## II. EXCEPTIONS TO RULE OF ABROGATION

### 1. Contracts, "Concomitant of Rights of Property"

"There is indeed no such general proposition as that a state of war avoids all contracts between subjects and enemies. Accrued rights are not affected, though the right of suing in respect thereof is suspended. Further, there are certain contracts, particularly those which are really the concomitants of rights of property, which, even so far as executory are not abrogated. Such as, for instance, the contract between landlord and tenant, of which an example may be found in the recent case of *Halsey v. Lowenfeld*.<sup>4</sup> In other words, the executory contract which is abrogated must either involve intercourse, or its continued existence must be in some other way against public policy, as that has been laid down in decided cases": *Ertel Bieber Case*.<sup>5</sup>

### 2. Covenant to Pay Rent

A pre-war covenant by an alien enemy to pay rent is neither extinguished nor suspended during war: *Halsey v. Lowenfeld*.<sup>6</sup>

The lessee of a theatre was an Austrian who, upon the outbreak of war, became an alien enemy. He was sued for three months' rent due during 1915. Although he was residing in Austria, no intercourse had taken place with an enemy: *under the Proclamation of 9th September, 1914, payment by an enemy to a person resident here was permitted, if it arose out of a pre-war transaction.*

<sup>1</sup> *The Fibrosa Case* [1943] A.C. 32; *infra*, Chap. XXV.

<sup>2</sup> *Ib.*, per Lord Porter, at 77; *infra*, Chap. XXV.

<sup>3</sup> Subject to certain exclusions (s. 2). See *infra*, Chap. XXVIII.

<sup>4</sup> [1916] 2 K.B. 707, *infra*.

<sup>5</sup> [1918] A.C., at 269, per Lord Dunedin. See *Ottoman Bank v. Jbara* [1928] A.C. 269, 276. The argument was unsuccessfully raised where a contract for the supply of iron ore over ninety-nine years was said to be "concomitant of property": *The Orconera Iron Ore Case* (1917), 33 T.L.R. 570, per Younger, J.; (1918), 34 T.L.R. 307 (C.A.); (1919), 35 T.L.R. 234 (H.L.).

<sup>6</sup> [1916] 2 K.B. 707, 713, per Lord Reading, C.J. See the two propositions stated by Warrington, L.J. (at 716). Trading with the Enemy Act, 1939, s. 1 (2), proviso (ii).

"But if the Crown refrains from exercising the right to confiscate and allows the alien enemy to continue in ownership of the property he holds it subject to all its obligations . . . the covenant remains notwithstanding the war. If there is a breach of contract, the enemy may be sued."

### 3. Irrevocable Power of Attorney ; Donor becoming Alien Enemy

An irrevocable power of attorney to sell land and give receipts for the purchase-money, given when the donor is an alien friend, is not avoided if he becomes an alien enemy : *Tingley v. Müller*.<sup>1</sup> *Sed quaere*.

On 20th May, 1915, M, a German national, resident for many years in England, executed a power of attorney appointing his solicitor as his attorney to sell his house and to execute the necessary documents. On 26th May, M, having obtained a permit to leave the country, embarked ; there was no evidence of the date when he reached Germany, but on 11th June he was resident in Hamburg. On 2nd June the premises were sold by public auction to the plaintiff, who claimed a declaration that the agreement of sale had been dissolved by reason of M becoming an alien enemy. The proper inference from the facts was that on 2nd June, M had arrived and was resident in Germany and was therefore an alien enemy. The full Court of Appeal (Scrutton, L.J., *dissenting*) held that the power of attorney was not avoided ; the agreement of sale did not involve any intercourse with the enemy and was valid ; the sale could legally be carried out by the attorney without communication with the defendant, and could be completed by vesting order, or with the help of the Custodian for Enemy Property. The purchase price would not be remitted to the defendant during the war.

The court referred to *Williams v. Payne*.<sup>2</sup> A power of attorney, executed before the Civil War in a Northern State in 1859, by a married woman and her husband, to convey vacant land in Washington, was not revoked by the fact that when war broke out she and her husband removed to a Southern State, where he entered the Confederate service and she resided until the end of the war.

<sup>1</sup> [1917] 2 Ch. 144. See, however, the Trading with the Enemy Act, 1939, s. 1 (3), wherein "enemy" includes "a person acting on behalf of an enemy."

<sup>2</sup> (1897), 169 U.S. 55, 73, 74, *per* Peckham, J. "The mere fact of the breaking out of a war does not necessarily and as a matter of law revoke every agency. Whether it is revoked or not depends upon the circumstances surrounding the case and the nature and character of the agency." This, it is submitted, is not the law of England : see *per* Lord Porter in *The Soufracht Case* [1943] A.C. 203, 254.

Scrutton, L.J., delivered a "powerful" dissenting judgment.<sup>1</sup> He held that the moment the defendant left England and abandoned his commercial domicile, his national character reverted and, until he acquired another commercial domicile, he became an alien enemy. "If you can find no domicile his birth or allegiance settles the question."<sup>2</sup> To contract with him personally, although through an agent, for the sale of land in England was intercourse with the enemy. "Perhaps selling land is not ordinarily called trading . . . ; but selling English land to Germans must be against the spirit and the letter of the law, and the selling of English land by Germans seems to me the same. If M was one party to the contract it can make no difference that he contracted through an English agent."<sup>3</sup> The appointment of an English trustee or attorney during the war, involving intercourse with the enemy, is illegal: an existing appointment becomes illegal when the *cestui que trust* or principal becomes an alien enemy.<sup>4</sup>

"The safer rule is to treat all dealings with alien enemies as forbidden, unless the Crown expressly sanctions them."<sup>5</sup> Lord Sumner says:—

"Intercourse with an enemy subject resident in the enemy country is forbidden, even though it takes place through his agent in the United Kingdom."<sup>6</sup>

### III. PROSPECTIVE CONTRACTS; RULE OF ILLEGALITY.

All contracts, whether commercial or not, sought to be made with an alien enemy (excluding a privileged alien enemy), unless licensed by the Crown, are illegal and void: *The Panariellos*.<sup>7</sup>

Sir Samuel Evans, P., stated the following general propositions:—

<sup>1</sup> [1917] 2 Ch. 144, 170–181. His reasoning, with respect, is to be preferred. Lord Wright thought that Scrutton, L.J.'s judgment "correctly states the law": *The Soufracht Case* [1943] A.C. 203, 246. See *Termination of Agency by War*, in (1917), 31 Harv. L. Rev., 637–640. "The best rule, therefore, is to regard war, as at once, and without regard to the knowledge or consent of the parties, terminating the relation."

<sup>2</sup> [1917] 2 Ch., at 175. Upon *Loss of Enemy Character*, see Domke, chap. 12, 167–171.

<sup>3</sup> *Ib.*, 176.

<sup>4</sup> *Ib.*, 177, criticising Lord Parker's *obiter dictum* in *The Damsler Case* [1916] 2 A.C. 307, 347.

<sup>5</sup> [1917] 2 Ch., at 181.

<sup>6</sup> *The Panariellos* (1915), 85 L.J. (P.) 112, 116; *infra*.

<sup>7</sup> (1915), 31 T.L.R. 326; (1916), 32 T.L.R. 459; 85 L.J. (P.) 112, 116, affirmed by the Privy Council, *per* Lord Sumner. See *Janson's Case* [1902] A.C. 484, 499, *per* Lord Davey; cf. *Willison v. Patterson* (1817), 7 Taunt. 438, 450, *per* Burrough, J.; "The bill is a contract; no contract can be enforced in a court of British judicature which is made during the war and which is made by an alien enemy."

"First, when war breaks out between States, all commercial intercourse between citizens of the belligerents *ipso facto* becomes illegal, except so far as it may be expressly allowed or licensed by the head of the State. When the intercourse is of a commercial nature, it is usually denominated 'trading with the enemy.' This proposition is true, also, I think, in all essentials with regard to intercourse which cannot fitly be described as commercial.

Secondly, on the outbreak of a war in which a belligerent has allies, the citizens of all the allied States are under the same obligations to each allied State as its own subjects would be to a single belligerent State, with relation to intercourse with the enemy.

Thirdly, where such illegal intercourse is proved between allied citizens and the enemy, their property engaged in such intercourse, whether ship or cargo, is subject to capture by any allied belligerent, and is subject to condemnation in that belligerent's own Prize Courts.

Fourthly, when such intercourse in fact takes place, the property of the persons engaged in it is confiscated whether they were acting honestly and with *bona fides* or not."<sup>1</sup>

Before the War of 1914, a French company contracted to sell silver lead to a German company in Greece, and chartered a Greek steamer to convey the lead to Newcastle. During loading, war broke out; the steamer sailed for Antwerp and Newcastle with her cargo. The French company diverted her to Swansea where the lead was seized as prize and sold. The French company, though *bona fide*, had traded with the enemy; the lead was confiscable and the proceeds prize.<sup>2</sup>

This decision was followed in *Kreglinger & Co. v. Cohen*.<sup>3</sup> Before the war, the plaintiffs, Belgians carrying on business in Antwerp and London, sold hides by c.i.f. contracts to the defendant, a German trading in Hamburg (and, before the war, in London also). The contracts became illegal on the outbreak of war. "It would be equally illegal for a Belgian, as being the subject of an allied State, to carry on trading with an enemy."

#### IV. EXECUTORY CONTRACTS BETWEEN CROWN AND ENEMY

1. An executory contract between the Crown and an alien enemy, it is submitted, unless it is "concomitant of a right of

<sup>1</sup> (1915), 31 T.L.R., at 327.

<sup>2</sup> *The Panariellos, supra*.

<sup>3</sup> (1915), 31 T.L.R. 592, *per* Bray, J.

property," is abrogated upon the outbreak of war upon the same principle as any other executory contract.<sup>1</sup>

2. Where the Crown is party to a contract, "the general principle which determines the proper law of the contract is the same: it depends upon the intention of the parties . . ."<sup>2</sup> The House of Lords rejected the view of Lord Wright, M.R. (delivering the judgment of the Court of Appeal), that in the case of a contract by a government "special features" exist from which it should be inferred that the law of such government is the proper law<sup>3</sup> (e.g., that only in its own courts, if at all, can it be sued, or if, in its discretion, it waives immunity in a foreign court).

If the proper law of a particular contract is not English law, the principle laid down in *Dynamit Actiengesellschaft v. Rio Tinto Co.*<sup>4</sup> will apply: where the contract is contrary to an "essential public interest," even if it is valid by its proper law, it will not be enforced in the English courts.

3. The Crown, which may license a subject to trade with the enemy, may itself contract, or hold intercourse, with an enemy. The Crown is not bound by the Trading with the Enemy Act, 1939, which is "without prejudice to the exercise of any right or prerogative of the Crown."<sup>5</sup>

In *Rederiaktiebolaget Amphitrite v. R.*,<sup>6</sup> the British Legation at Stockholm, during the war of 1918, made an "arrangement" with a Swedish shipping company that if the *S.S. Amphitrite* proceeded to the United Kingdom with an approved cargo, she would earn her release and be given a coal cargo. Later, the British Government withdrew loading facilities; the ship had to be sold and the owners claimed damages for breach of the undertaking. There was no enforceable contract. Rowlatt, J., held:

"No doubt the Government can bind itself through its officers by a commercial contract, and if it does so it must

<sup>1</sup> See, however, McNair, 107-111, who states that since the Crown may lawfully hold intercourse with the enemy, such a contract is not, upon the outbreak of war, automatically dissolved, but may be repudiated by the Crown (at 109). He instances contracts with a foreign cotton-growing company to buy its crop for a period of years, a concession to a foreign company to work minerals on Crown land. The Crown may lawfully repudiate any contract which would tend to enrich the enemy (110).

<sup>2</sup> *Rex v. International Trustee, etc.* [1937] A.C. 500, 531, per Lord Atkin.

<sup>3</sup> *Id.*, 510, 511, citing *Smith v. Woguelin* (1869), L.R. 8 Eq. 198, 212, 213, per Lord Romilly, M.R.; *Goodwin v. Roberts* (1876), 1 A.C. 476, 494, per Lord Selborne; and Beale, *Conflict of Laws* (1935), vol. 2, 1102. See the speech of Lord Roche [1937] A.C., at 574.

<sup>4</sup> [1918] A.C. 292, 302, per Lord Parker, citing from Westlake, *Private International Law*, s. 215.

<sup>5</sup> Section 16.

<sup>6</sup> [1921] 3 K.B. 500, 503.

perform it like anybody else or pay damages for the breach. But this was not a commercial contract; it was an arrangement . . . an assurance as to what its executive action would be in the future in relation to a particular ship in the event of her coming to this country with a particular kind of cargo." That was not a contract but merely "an expression of intention to act in a particular way in a certain event."

" . . . it is not competent for the Government to fetter its future executive action, which must necessarily be determined by the needs of the community when the question arises. It cannot by contract hamper its freedom of action in matters which concern the welfare of the State."

4. If it is not the law that upon the outbreak of war an executory contract between the Crown and an alien enemy is abrogated, yet if the adventure is frustrated, the contract will be dissolved.<sup>1</sup>

5. The Crown has power, under the prerogative, by "inquisition of office" held before the conclusion of peace, to confiscate the property of alien enemies, including their rights under a contract: *In re Ferdinand, Ex-Tsar of Bulgaria*.<sup>2</sup>

## B. UNDER TRADING WITH THE ENEMY ACT, 1939

### I. ALL INTERCOURSE AND DEALINGS, ILLEGAL

The Trading with the Enemy Act, 1939 (as later amended by Defence Regulations), repealed the Trading with the Enemy Acts, 1914-18.<sup>3</sup> Under those statutes, proclamations were issued stating specified acts of prohibited intercourse, declaratory, but not exhaustive, of the common law. The present statute goes beyond the common law<sup>4</sup>:

<sup>1</sup> See McNair, *ib.*, 110; *infra*, Chap. XXV.

<sup>2</sup> [1921] 1 Ch. 107. During the last war, the effect of the Trading with the Enemy Acts, 1914-16, was to suspend this prerogative. See authorities cited by Lord Sterndale, M.R., at 124, distinguishing *Wolff v. Oxholm* (1817), 6 M. & S. 92, and (at 127, 128) citing the judgment of Lord Reading, C.J., in *Porter v. Freudenberg* [1915] 1 K.B. 857, 869, who refers to Blackstone, 21st ed., vol. I, c. 10, 372, and Hale, *Pleas of the Crown*, 1, 95, and says: "Whether the right of the Sovereign to confiscate any of the alien enemies' goods or debts in this realm was ever exercised or not, . . . there can be no doubt about the existence of the right: see *A.-G. v. Weeden, Parker*, 267," where it was said: "Upon long debate it was resolved, first, that choses in action which belonged to an alien enemy were forfeitable to the Crown." See *per* Warrington, L.J., at [1921] 1 Ch. 136, and *per* Younger, L.J., at 143-145.

<sup>3</sup> Under s. 17 (2) and S.R. & O., 1939, No. 1195, the Act came into force on 3rd September, 1939. Amended by S.R. & O., 1940, Nos. 1092, 1214, 1289, 1381; 1941, No. 51; 1942, No. 306; 1943, No. 1034. See *Trading with the Enemy. Legislation in Force in the United Kingdom on 1st March, 1945*, His Majesty's Stationery Office.

<sup>4</sup> McNair, 177; S.R. & O., 1914, No. 1376. "Contract or obligation" in the proclamation becomes, in the statute, "Any . . . intercourse or dealings."

"Any commercial, financial or other intercourse or dealings with, or for the benefit of, an enemy"<sup>1</sup> are prohibited: the words will be given the widest possible interpretation. "Enemy" includes a person acting on behalf of an enemy.<sup>2</sup> "Without prejudice to the generality" of this provision, three types of dealing are particularised:—

(i) *The supply of goods* to or for the benefit of an enemy; or obtaining goods from an enemy; or trading in, or carrying, goods consigned to or from an enemy or destined for or coming from enemy territory;

(ii) *The payment or transmission of any money*, negotiable instrument or security to or for the benefit of an enemy or to a place in enemy territory;

(iii) *The performance of any obligation* to an enemy, or the discharge of any obligation of an enemy, *whenever undertaken*.<sup>3</sup> Even this definition of "trading with the enemy" is not complete: a person commits the offence

"if he has done anything which, under the following provisions of this Act is to be treated as trading with the enemy; and any reference in this Act to an attempt to trade with the enemy shall be construed accordingly."<sup>4</sup>

Two types of transaction are excluded. These, *by themselves*, will not constitute trading with the enemy:—

(i) Acts done *under authority* given generally or specially by a Secretary of State, the Treasury or the Board of Trade;

(ii) *The receipt of payment from an enemy* of money due on a transaction under which all obligations on the part of the recipient had been performed when the payment was received and at a time when the person from whom payment was received was not an enemy.<sup>5</sup>

<sup>1</sup> Section 1 (2) (a). See *In re Anglo-International Bank, Ltd.* [1943] Ch. 233, 239.

<sup>2</sup> Section 1 (3) "Enemy" is defined in s. 2; "enemy territory" in s. 15 (1), (1A), *supra*, 97. See Domke, *Acting "For the Benefit of the Enemy,"* 154-166.

<sup>3</sup> Section 1 (2) (a) (i), (ii), (iii).

<sup>4</sup> Section 1 (2) (b), e.g., under ss. 4 (3) or 6 (1). The last limb was added by Defence (Trading with the Enemy) Regulations, 1940, reg. 2 (1); cf. amendment of s. 1 (1) by the words "or attempts to trade with."

<sup>5</sup> Section 1 (2), provisos (i) and (ii). On (ii), see *Halsey v. Lowenfeld* [1916] 2 K.B. 707, *supra*. For licences, see *General Licence* relating to *Freights* (S.R. & O., 1940, No. 482), authorising the payment of freight and other charges to or for the benefit of an enemy through the London Chamber of Commerce, if the sum did not exceed 5 per cent. of the original c.i.f. invoice value of the cargo. Under the Trading with the Enemy (Shipping Claims) Order, 1940 (S.R. & O., 1940, No. 1567), this licence only applies where the person was an enemy before 8th April, 1940. See also *Cargoes and Claims (Information) Order*, 1940 (S.R. & O., 1940, No. 1568); *Trading with the Enemy (Shipping Claims) Order*, 1941 (S.R. & O., 1941, No. 244). And see the Trading with the Enemy (East Africa) Order, 1941 (S.R. & O., 1941, No. 1116).

"This court cannot sufficiently inculcate the duty of applying, in all cases, for the protection of a licensee, where property is to be withdrawn from the country

The statute also prohibits, except with the sanction of the *Treasury*, the transfer of negotiable instruments and the assignment of choses in action by enemies. Where a claim upon a negotiable instrument or chose in action is made against a person who reasonably thinks that payment would constitute trading with the enemy, he may pay the money into the High Court and for all purposes this payment will be a discharge.<sup>1</sup> The transfer of securities by or on behalf of an enemy, or the allotment or transfer of securities issued by a company to or for the benefit of an enemy subject without the sanction of the *Board of Trade*, will vest in the allottee or transferee no rights or remedies without the sanction of the Board; except with the Board's authority, no body corporate issuing or managing the securities may take cognisance of, or act upon, the transfer. No share warrants, stock certificates or bonds, payable to bearer, shall be issued in respect of securities (as defined) which are registered or inscribed in the name of an enemy or a person acting on behalf of, or for the benefit of, an enemy.<sup>2</sup> Purchasing "enemy currency" (as defined) is trading with the enemy.<sup>3</sup>

The Board has power—by means of "inspectors" and "supervisors"—to inspect and supervise businesses.<sup>4</sup> The Board is also empowered, "where any business is being carried on in the United Kingdom by, or on behalf of, or under the direction of, persons, all or any of whom are enemies or enemy subjects or appear to the Board of Trade to be associated with enemies, to make—

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of the enemy: it is indeed the only safe way in which parties can proceed: *The Juffrow Catharina* (1804), 5 C. Rob. 141, 142, 143, per Sir W. Scott. A licence not granted till after capture affords no protection: *The Vrow Deborah* (1812), 1 Dods. 160, 167. "A licence does not act retrospectively, and cannot take away an interest which is vested, in point of law, in the captors": per Sir W. Scott. For a licence to the English manager to carry on a business whose head office was in Paris with a branch in London, granted by the Board of Trade after Paris became enemy-occupied territory, see *Meyer v. Louis Dreyfus et Cie* (1940), 4 All E.R. 157. Upon licences generally, see McNair, 182, 188; *supra*, 149-151; *Trading with the Enemy Legislation in Force, III General Licences*.

By *The Trading with the Enemy* (Authorisation) Order, 1944 (S.R. & O., 1944, No. 78), any person may trade with Italian East Africa, Cyrenaica and Tripolitania, unless the Board of Trade otherwise direct. Thus also *The Trading with the Enemy* (Corsica) Order, 1943 (S.R. & O., 1943, No. 1685).

<sup>1</sup> Section 4. See also proviso to s. 3; it will be a defence that the defendant, when he paid, had reasonable grounds for believing that the liability was enforceable against him by a neutral court and would be so enforced. In *In re I.G. Farbenindustrie Aktiengesellschaft's Agreement* [1941] Ch. 147, 150, 151, Morton, J., held that where an enemy company is a bare trustee of a chose in action for a British subject, a vesting order is not an "assignment" within s. 4 (1). Even if it were, it would be an assignment, not on behalf of an enemy, but on the application of a non-enemy who claims a beneficial interest.

<sup>2</sup> Section 5.

<sup>3</sup> Section 6.

<sup>4</sup> Section 3 (1) and (2).



(a) a "restriction order," prohibiting carrying on the business either absolutely or subject to specified purposes or conditions ; or

(b) a "winding-up order," requiring the business to be wound up.<sup>1</sup>

The Board may then, by later order, appoint a *controller* to supervise the carrying out of the order, or (as the case may be) to conduct the winding-up, and may confer on him such powers as are exercisable by a liquidator in the voluntary winding-up of a company (including power to convey or transfer any property), and any other powers that the Board think necessary or convenient.<sup>2</sup> No bankruptcy petition against a firm, or petition for winding-up of a company, may be presented without the Board's consent ; the Board may present a petition to wind up a company by the court and the making of an order under s. 3A will be a ground on which the company may be wound up by the court.<sup>3</sup>

## II. "FOR THE BENEFIT OF AN ENEMY"

Intercourse or dealing with, or for the benefit of, an enemy, is prohibited whether "by some device or circuitous means" or whether it results from "a perfectly *bona fide* pre-war financial transaction." In *The Schering Case*,<sup>4</sup> Sir Wilfrid Greene, M.R., said :—

" . . . those words are of the widest possible character, and they are wide enough to sweep in any transaction of which it can be truly said (and this is a question of fact in each case) that it is for the benefit of an enemy."

### 1. *By Device or Circuitous Means*

In *R. v. Kupfer*,<sup>5</sup> K, who lived and carried on business in London, was one of three partners, all naturalised British subjects. The others lived and traded at Frankfurt. Before the outbreak of war in 1914, the partners owed money to a Dutch firm upon a transaction between the partners in Frankfurt and the neutral. On instructions from his partners, K paid the debt to Blydenstein, bankers in London, who had a branch in Holland, directing them to credit the neutral, which they did. He was convicted of making payments "for the benefit of an

<sup>1</sup> Section 3A (1) introduced by Defence (Trading with the Enemy Regulations) 1940 (S.R. & O., 1940, No. 1092), reg. 6, 7.

<sup>2</sup> Section 3A (2). See para. (3) for order of distribution of assets, and paras. (4) and (5) upon the preparation of an estimate, and the conclusive character of the controller's certificate

<sup>3</sup> Section 3A (8). See McNair, 218-222.

<sup>4</sup> *Stockholms Enskilda Bank Aktiebolag v. Schering, Ltd.* [1941] 1 K.B. 424, 437.

<sup>5</sup> [1915] 2 K.B. 321, 337.

enemy." Lord Reading, C.J. (delivering the judgment of the Court of Criminal Appeal), said :—

"In our judgment those words were deliberately introduced for the purpose of preventing devices, tactics, and various means by which mercantile houses might seek, but for those words, to make payments indirectly, notwithstanding that there is an express prohibition of a direct payment . . .

Those words are very wide and must be construed to have a very wide application. It is not necessary or desirable to define exactly the meaning of the words. They are intended to cover the making of payments to the enemy by any device or by any recourse to indirect means."

On the other hand, where, *before* the War of 1914 and in anticipation of it, W, a British subject in partnership with a German in Germany, made an agreement with his German partner to dissolve partnership, the German taking over the German assets and liabilities, and W the English business, and W brought an action upon a bill of exchange given to the firm for goods supplied before the war, Scrutton, J., held that the transaction was neither trading with, nor for the benefit of, the enemy : *Wilson v. Ragosine & Co., Ltd.*<sup>1</sup>

Yet, where Australian spirit merchants, who dealt with an American company carrying on business in New York with a branch at Rotterdam (whose practice was to send gin to Hamburg to be bottled before being shipped), ordered gin *after the outbreak of war*, knowing that it would have to be bottled in Hamburg, the Privy Council refused an application for leave to appeal against a conviction : *Moss v. Donohoe*.<sup>2</sup>

## 2. Any Transaction for Enemy's Benefit

The rule in *Kupfer's Case* was carefully considered by the Court of Appeal during the present war, in the *Schering Case*.<sup>3</sup> By an agreement made in German in February, 1936, between a Swedish bank, a German company (Schering), and an English and an Indian company (subsidiaries of the German company), the bank placed at the disposal of Schering £84,000 in reichsmarks and Schering agreed to repay a reduced sum of £50,400 in sterling (the reichsmarks discounted at 8s. in the £), eight years later. The English and Indian companies constituted themselves sureties liable as principals, to acquire from the *Enskilda* its claims against Schering by instalments. If the debt were duly taken over by instalments, the bank would receive £50,400 only. If, however, default were made in the payment of an instalment, Schering would have to pay £84,000

<sup>1</sup> (1915), 31 T.L.R. 264, 265.

<sup>2</sup> (1916), 32 T.L.R. 343.

<sup>3</sup> *Supra*, note 4, p. 204.

(less all payments previously made by the sureties). The bank could call in the debt if Schering or one of the sureties became bankrupt. The contract of debt was subject to German law ; to the legal relationship between the sureties and the *Enskilda*, English law was to apply. By an agreement made in April, 1936, made between *Enskilda* and the sureties, the sureties guaranteed the payment in sterling of the debt ; they undertook, as principals and not as guarantors, to make the *Enskilda* certain payments half-yearly in consideration of the assignment of a like sterling amount of the *Enskilda's* claim against Schering. Each payment was to be in satisfaction of the sureties' liability under the guarantee. The guarantee and the agreement were made in accordance with the law of England. The sureties having failed to pay an instalment due in October, 1939, the *Enskilda* issued a writ upon the April agreement. The defendants said that any payment would operate for the benefit of the German company or would discharge *pro tanto* the obligation of that company as principal debtor to the *Enskilda*. Hawke, J., held that the effect of the sureties' payments was to discharge an obligation of the German company.

It was argued, on appeal, that the Act did not prohibit benefits which would operate after the war ; nor did it prohibit a person from discharging a genuine obligation which might indirectly benefit the enemy. This was a pre-war contract ; payment was a payment to a neutral under a legal obligation ; the result was only an incidental benefit to the enemy. The sureties were merely discharging their own obligation, not the debt of the principal debtor. The respondents said that the Act constituted an addition to the common law : " a wide net intended to stop, during war-time, dealings that would otherwise be unobjectionable."<sup>1</sup>

Sir Wilfrid Greene, M.R., declared that " the perfectly simple and general words, 'for the benefit of', " could not be limited to a transaction " by some device or circuitous means " (as in *The Kupfer Case*) ; the words are " of the widest possible character " and include any transaction for the benefit of the enemy.<sup>2</sup>

Payment of the instalment would benefit the German company. The benefit of the discount would be preserved. Schering would, *pro tanto*, be relieved of its obligation to the *Enskilda*—and the sureties, during the war, could not enforce Schering's liability to them ; the substitution of a British creditor for a neutral creditor would benefit the German company. Moreover, payment would " discharge an obligation " of the German company within s. 1 (2) (a) (iii). Payment and assignment were " part of one and the same thing " ; even though

<sup>1</sup> [1941] 1 K.B., at 430.

<sup>2</sup> *Ib.*, 437.

Schering came under a liability to the sureties, Schering's obligation would be discharged. The dismissal of the present action would not prevent the plaintiff from bringing another action when the proper time had elapsed.<sup>1</sup>

### 3. *Contracts with Neutral*

In *Schering, Ltd. v. Stockholms Enskilda Bank*,<sup>2</sup> Simonds, J., (as he then was) held that since "the performance or continued existence" of the April contract with the neutral guaranteeing an enemy debt would be likely to benefit the enemy, the contract, at the outbreak of war, was abrogated. The Court of Appeal reversed his decision.

Lord Greene, M.R., laid down the following principle :—

" . . . in the case of a contract with a neutral the performance of which during the war is illegal, a suspensory clause postponing performance until after the end of the war can only be bad if it is at least shown that the continued existence of the contractual relation between the British subject and the neutral will in fact tend to increase the resources of the enemy while he is an enemy or that there is at least a substantial probability that this will be the case."

The English company, in voluntary liquidation, claimed a declaration against the bank that the contract of April, 1936, was no longer enforceable, on the grounds (a) that performance had been impossible or had been frustrated, (b) (by amendment at the trial), that it would enure for the benefit of the German company and to the plaintiffs' detriment, or would involve intercourse with the enemy and was therefore abrogated. Against the personal defendants the plaintiffs claimed release of a security and repayment of £25,000 which they held, representing goods pledged by the plaintiffs to the bank.

(a) Simonds, J. (as he then was), pointed out that four instalments falling due before the war were paid by the sureties, and an assignment in each case was made of the sum paid out of the claim of the Swedish company against the German company; a transaction inevitably entailing communication between the plaintiffs and the German company. At the outbreak of war fourteen instalments of the guaranteed debt were unpaid. In October, 1939, the first of the unpaid instalments becoming due, the Swedish company had sued the plaintiffs, and the Court of Appeal had held that payment would be an offence against the Trading with the Enemy Act, 1939. A year later, the plaintiffs issued the writ in this action.

"The test of intercourse, if I may so call it," said Simonds, J., "is not whether its performance must necessarily involve communication, nor whether it could perchance be carried out without communication with the enemy, but whether,

<sup>1</sup> [1941] 1 K.B., at 441.    <sup>2</sup> (1943), 112 L.J. Ch. 138, 142; [1944] Ch. 13, 25.

having regard to ordinary commercial practice, it is of such a kind that if it were carried out in the normal way some communication with the enemy might reasonably be expected."<sup>1</sup>

The plaintiffs could not perform their contract without inquiring of the principal debtor what was the position concerning the principal debt. Moreover, "the whole transaction from beginning to end was for the benefit of the German company." Every payment would *pro tanto* relieve the German company from its obligation to the Swedish company and thus reduce the resources of the plaintiffs. The April contract was abrogated; the plaintiffs were entitled to have released to them the security provided by the April contract—"the security for the performance of a contractual obligation which has no longer to be performed."<sup>2</sup>

It became unnecessary to determine whether, assuming that the contract was not abrogated, it became frustrated.

(b) *The Swedish bank appealed.* They contended that the *Schering* decision<sup>3</sup> was based on the Trading with the Enemy Act, 1939, and only affected payments falling due *during* the war; it did not affect the bank's right to receive payment *after* the war. The essence of the transactions was to get repayment from the English company, secured by a deposit of goods with the other defendants. The Swedish company had paid the German company; the German company had received all the benefit it could receive; the contract was not "executory." No general rule exists that on the outbreak of war a contract is abrogated if it *might* confer benefit on an enemy. Unless its continuance *must* involve intercourse with, or benefit to an enemy *during* the war, it is suspended, not dissolved. Here, not until after the war, would there be intercourse with, or benefit to, the German company.<sup>4</sup>

For the plaintiffs it was argued that the policy of the law is to strike at all contracts that *might* benefit an enemy, whether he is a party or not. The principle is subject to limited exceptions in the case of accrued rights and rights of property. At the outbreak of the war the Swedish bank had no accrued rights against anyone; nothing was owing to it. If the bank's claim were met, the German company would get the benefit of the discount. The continued presence of an English surety improved German credit and resources during the war.<sup>5</sup>

<sup>1</sup> (1943), 112 L.J. Ch., at 142. This passage from the judgment of Russell, J., in *Re Badische* [1921] 2 Ch., at 373, was quoted and followed: "The test should be, in my opinion, not whether one of the parties to the contract is an enemy, but whether the contract involves intercourse with the enemy, or confers an immediate or future benefit on the enemy."

<sup>2</sup> 112 L.J. Ch., at 143.

<sup>3</sup> [1941] 1 K.B. 424.

<sup>4</sup> [1944] Ch. 13, 17-18.

<sup>5</sup> *Ib.*, at 18.

Lord Greene, M.R., delivering judgment (in which Lord Clauson and du Parc, L.J., concurred), observed that the case which had succeeded before Simonds, J., was not raised in the previous proceedings; it would have afforded a complete defence.<sup>1</sup> The effect of war upon contracts between a British subject and a subject of a neutral state is not as clear as where the contract is between a British subject and an enemy. That upon the outbreak of war a contract between a British subject and a neutral *may*, at common law, be abrogated is "indisputable"; but what are the limits of the rule and the principles underlying it?<sup>2</sup>

Two considerations must be borne in mind. *First*, "the maintenance of commercial relations and the loyal performance of contracts with neutrals are matters which it is to the interest of this country to foster and encourage": hence "the measure of interference ought not to exceed what is required by the public interest in regard to the successful prosecution of the war."<sup>3</sup> *Secondly*, to a contract with a neutral, the absolute rule of abrogation "clearly cannot apply." Trading with a neutral during war is not unlawful. Although restrictions may be imposed, "this is not to say that an executory contract with a neutral is made unlawful at common law."<sup>3</sup> A contract with a neutral is not abrogated because its performance or continued existence might tend to cripple the national resources." What of the case where performance of such a contract "might enhance the resources of the enemy"? A contract with an enemy is assumed to be beneficial to the enemy State<sup>4</sup>: no such assumption applies to a contract with a neutral.

"If such a contract is to be abrogated by the outbreak of war," said Lord Greene, "it can only be on the ground that its performance will in fact enhance the resources of the enemy or that at least there is shown to be a substantial probability that this will be the case. These are matters which must be established by those who impugn the contract. They are not to be assumed as matters of law, although, of course, the provisions of the contract may settle the question."<sup>5</sup>

Again, an executory contract with an enemy is abrogated despite a suspensory clause. Then follows the principle already quoted above.<sup>6</sup>

<sup>1</sup> [1944] Ch., at 19-20.

<sup>2</sup> *Ib.*, at 22, citing *Esposito v. Bowden* (1857), 7 E. & B. 763, and giving, as another example, a case where the contract provided that goods supplied by a British subject to a neutral should be resold by him to an enemy.

<sup>3</sup> *Ib.*, at 23.

<sup>4</sup> *Per* Lord Atkinson, in *The Ertel Bieber Case* [1918] A.C. 260, 277.

<sup>5</sup> [1944] Ch., at 24.

<sup>6</sup> *Ib.*, at 25, *supra*, 207.

The performance of the April contract during the war is illegal under the Trading with the Enemy Act, 1939, and would be illegal at common law. "*The only effect so far is that performance is suspended during the war.*"<sup>1</sup>

Lord Greene proceeded to consider two questions: (a) on the footing that the guarantee was *suspended* during the war, what would the position be *at the end of the war*? (b) would the enemy be benefited *during the war*?<sup>2</sup> He answered them thus: (a) if, after the end of the war, the Swedish bank enforced the guarantee against Schering, Ltd., the latter, by subrogation, could sue the German company; (b) during the war the German company would have to provide for payment of the debt when the war ended. The debt must be paid to a different creditor, Schering, Ltd., but this would not improve the credit of the German company or confer an advantage on it. It was said that if, during the war, the Swedish bank did not claim against the German company, that company would in effect obtain a moratorium, but would the existence of the contract, its performance suspended, benefit the enemy? "A possibility of benefit"<sup>3</sup> indeed there was, but whether it materialised would depend upon the duration of the war and the action of the Swedish bank.

"Is it, therefore, to be said that a possibility of benefit to an enemy so vague and uncertain is to free a British subject from his obligation to a neutral, undertaken years before the war in respect of a guarantee of a sum of money advanced by the neutral to a German company at the request of the British subject?"<sup>3</sup>

If, indeed, this were so, a large number of contracts with neutrals must "necessarily fall." It was "as impossible as it is on public grounds undesirable to lay down that mere possibilities of this character must as a matter of law abrogate a contract with a neutral."<sup>4</sup>

An appeal to the House of Lords is pending and these propositions will, no doubt, be subject to careful scrutiny.<sup>5</sup>

### III. SPECIFIC TRANSACTIONS

#### 1. *Supply of Goods*

(a) *Writing and posting a letter to a neutral in a neutral country requesting him to ask certain enemies if goods could be delivered to them through the neutral, even though the neutral is not the agent or representative of the enemy, is a "proposal" to trade*

<sup>1</sup> [1944] Ch., at 26; author's italics.

<sup>4</sup> *Ib.*, at 29.

<sup>2</sup> *Ib.*, at 27.

<sup>5</sup> See McNair, 238.

<sup>3</sup> *Ib.*, at 28.

with the enemy, and therefore a "dealing with" the enemy : *H.M. Advocate v. Innes*.<sup>1</sup>

(b) *Writing and posting a letter to agents in a neutral country*, suggesting that they deliver to a German firm cargo stored on the quay at a neutral port and agreeing to terms for delivery, constitute a proposal and an agreement to supply goods to the enemy : *H.M. Advocate v. Hetherington*.<sup>2</sup>

The offence of "supplying" goods may be committed even though the person supplying is not the owner and has no right to disposal, and even though at the date when they were supplied the property in the goods has already vested in the enemy : *H.M. Advocate v. Hetherington*.<sup>3</sup>

Lord Justice-General Strathclyde said :—

"Now, the prohibition is absolute and unqualified, and no more general word could be used than the word, . . . 'supply.' It does not say 'sell goods to the enemy,' it does not say 'hire or lend or give goods to the enemy'; it just says 'supply goods to the enemy,' and accordingly ownership has nothing really to do with this criminal offence. A man may supply goods to the enemy which do not belong to him at all. He may have come by them by honest or dishonest ways; he may have no right whatsoever to dispose of those goods; but if he supplies them to the enemy an offence is committed . . ."<sup>3</sup>

Supplying goods to the enemy frustrates the object of crippling the enemy's resources, whether the goods belong to the person supplying or not.<sup>4</sup> Nor does it signify anything whether he receives payment or not. The precise relation of the intermediary is irrelevant. "He may be your servant, he may be your agent, he may be a total stranger; if he has been selected by you as the intermediary through whom you supply the goods to the enemy, then it signifies nothing what his relationship to you otherwise may be."<sup>4</sup>

(c) *Contraband material imported into a neutral country, to be manufactured into goods for the enemy, may be seized as prize ex a neutral ship* : *The Balto*.<sup>5</sup>

Bales of leather consigned from Boston to Sweden were seized ex the *Balto*, a Norwegian steamship. The claimant contended

<sup>1</sup> [1915] S.C. (J.) 40, 42. "The statutory crime is that of indirectly supplying goods or procuring the supply of goods, or trading with the enemy."

<sup>2</sup> [1915] S.C. (J.) 79. The agents were Gebrüder Van Uden, Rotterdam.

<sup>3</sup> *Ib.*, 88; cf. Sale of Goods Act, 1893, s. 14, implied conditions as to quality or fitness for any particular purpose of "goods supplied under a contract of sale," and *Gedding v. Marsh* [1920] 1 K.B. 668, 672, 674, per Bray and Bailhache, JJ.

<sup>4</sup> *Ib.*, 89.

<sup>5</sup> [1917] P. 81, 83, 84. "If a field gun was imported, would it be protected from seizure because it would, in fact, be mounted upon its appropriate carriage before being exported from a neutral country to the enemy's front?"



that by going into the Swedish factory the goods would be "absorbed into the common stock" of the country. The Crown alleged that the leather was to be manufactured into shoes for the enemy, and obtained discovery of documents relating to boots. Sir S. Evans, P., rejected the contention that contraband goods cannot be seized on a continuous voyage, unless they are on their way to a final enemy destination in the same condition as they were at the time of seizure.

And in his great judgment in *The Kim*,<sup>1</sup> Sir S. Evans said :—

" . . . the court is not restricted in its vision to the primary consignments of the goods in these cases to the neutral port of Copenhagen : but is entitled, and bound, to take a more extended outlook in order to ascertain whether this neutral destination was merely ostensible, and, if so, what the real ultimate destination was."

On the other hand, in *The Bonna*,<sup>2</sup> coconut oil (conditional contraband), the property of Swedish manufacturers of margarine, seized as prize ex a neutral vessel, was released : it was not liable to condemnation merely because the margarine would be consumed in Sweden in substitution of Swedish butter supplied to Germany. Sir S. Evans, P., said : " if it were established that raw materials were imported by a neutral for the manufacture of margarine with an intention to supply the enemy with the manufactured article, I should be prepared to hold that the doctrine of continuous voyage applied so as to make such raw materials subject to condemnation as conditional contraband with an enemy destination.

" I should go even further and hold that, if it were shown that in a neutral country particular manufacturers of margarine were acting in combination with particular

<sup>1</sup> [1915] P. 215, 275. International law, he said, to be adequate as well as just, must have regard to the circumstances of the times, including " the circumstances arising out of the particular situation of the war, or the condition of the parties engaged in it." *Id.* *The Jonge Margaretha* (1799), 1 C. Rob. 189, 193, 194, *per* Sir W. Scott.

See also Kunz, *British Prize Cases, 1939-1941*, A.J.I.L., vol. 36 (1942), 204-229 ; Roscoe *Prize Court Procedure*, B.Y.I.L., 1921-22, 90-98.

For the nature of prize law, see the speeches of Lord Wright in *Francis Fenwick Tyre and Wear Co. v. Procurator-General (The Prince Knud)* [1942] A.C. 667, 676, 679, and in *Conservas Cerqueira Limitada v. H M. Procurator-General* [1944] A.C. 6, 9 : " Captors are entitled to seize property, ship or goods, if there is reasonable ground for suspicion that the property is subject to be condemned . . . Persons claiming to be interested in the property . . . must prove their title to the property . . . In other words, they must show by affirmative evidence that the reasonable suspicions were unfounded." See also McNair, 180-182.

<sup>2</sup> [1918] P. 123, 128. See *The Axel Johnson* [1921] 1 A.C. 473, 476, *per* Lord Sumner, where wool (absolute contraband) consigned to neutrals in Sweden was seized as prize. The wool was to have been sent to Germany to be combed, the combed wool to be returned to Sweden, the waste to be retained in Germany. The process would have involved a considerable stay in Germany and the identity of the wool would have been altered.

producers or vendors of butter, and that the intention and object of their combination was to produce the margarine in order to send the butter to the enemy, the same doctrine would be applicable with the same results."

(d) Where buyers were bound, under contract, to declare one of four ports as the port of destination and after the outbreak of war in 1939 declared Bremen, they were entitled to withdraw this declaration in favour of Antwerp: *Hindley & Co., Ltd. v. General Fibre Co., Ltd.*<sup>1</sup>

By a contract made in July, 1939, the Fibre Company sold to H 250 bales of jute c.i.f. to be shipped from Calcutta for H.A.R.B. (Hamburg, Antwerp, Rotterdam, Bremen) between 1st September, 1939, and 31st October, 1939. On 11th September H declared Bremen. On 22nd September the Fibre Company wrote that the contract must be regarded as cancelled. On 27th September H wrote saying that since the declaration of an enemy port would not be legal, he declared Antwerp or Rotterdam (a good declaration in the jute trade). On 3rd October he declared Antwerp. The jute was never shipped. Subject to the opinion of the court, the Appeal Committee of the Jute Association, to whom the sellers after a reference had appealed, awarded in the form of a special case that the contract was not cancelled and that the sellers were in default.

For the sellers it was argued that once the buyers had declared Bremen, the right to declare other ports had gone and that the contract was illegal and void. The buyers contended that the contract could still be performed in a legal way; the declaration of Bremen was a nullity and could be withdrawn in favour of a good declaration. Atkinson, J., agreed with the buyers.<sup>2</sup>

(c) "Where under a contract for the sale of goods made before the outbreak of war between an enemy seller and a neutral buyer the transfer of the property in the goods is made while the goods are still *in transitu* . . .

First: If it is proved that the contract was made in the ordinary course of business and not in contemplation of war, and was a *bona fide* transaction in the sense that there was no fraudulent or collusive reservation of interests to the seller, then although the buyer has not taken actual delivery before seizure, his claim is recognised in prize.

<sup>1</sup> [1940] 2 K.B. 517.

<sup>2</sup> *Ib.*, 532, 533. He followed *The Teutonia* (1871), L.R. 4 P.C. 171, 181, *per* Mellish, L.J., where, the Franco-German war having broken out, the master, unable to discharge at Dunkirk, a closed port, put in to Dover and was entitled to freight for delivery at Dover. In *Waugh v. Morris*, L.R. 8 Q.B. 202, 206, the consignee named a wharf in London for delivery, which he supposed erroneously to be a legal place; "that did not put an end to the contract, if the performance in any other way was legal and practicable," *per* Blackburn, J.

Second : If, however, the contract, though made *bona fide* in the above sense, was made in contemplation of the outbreak of war, the buyer cannot establish his claim to the goods unless he has taken actual delivery before seizure": *The Glenearn*.<sup>1</sup>

A British company claimed 20 tons of latex, a rubber product, which the Crown sought to condemn as prize. Laden in *The Glenearn*, a British steamship, they had been sold by the claimants, c.i.f. to a German company in Hamburg, who, in return for an accepted bill, had received the documents of title. *The Glenearn* arrived in London at the end of August, 1939, and abandoned the voyage to Hamburg. In the ordinary course of business under the pre-war agreement between the parties, there were two other consignments of latex from the claimants in German vessels at Genoa on their way to the German company for which the claimants, having retained the documents of title, had not been paid. On 28th August, in view of the international tension, and in contemplation of war between England, Germany and Italy, the claimants agreed with the German company that 20 tons from these vessels should be exchanged for 20 tons ex *The Glenearn* then being discharged at London. Through a Dutch firm the shipping documents were exchanged. On 1st September the claimants received the documents relating to *The Glenearn* consignment, and having no warehouse of their own, they instructed their agents to clear the goods and store them on their own premises, which was done on 12th September. On 9th October the goods were seized as prize. It was admitted that the property in the goods had re-passed before the outbreak of war.

The Crown contended that the consignment should be condemned. The agreement to protect the German goods from seizure was made in contemplation of war and was against public policy. The goods were in transit in expectation of war : constructive delivery to the claimants' agents after the outbreak of war would not pass the property. The claimants argued that the agreement was *bona fide* ; the intention was to pass the property which passed at the date of the agreement. The claimants obtained actual possession through their agents when the goods were warehoused on their behalf.

The President held that the "exchange agreement" was made *imminente bello* and *bona fide* without "secret or collusive understanding that it was to be disregarded if, contrary to expectation, war should not break out, but was to be performed, in any event, according to its tenor."<sup>2</sup> The German company were enabled to obtain possession of the claimants' latex at Genoa and the claimants could assert that the 20 tons in London,

<sup>1</sup> [1941] P. 51, 63, per Lord Merriman, P.

<sup>2</sup> *Ib.*, 60.

which would otherwise have been enemy property, was their own and exempt from seizure.

Now "intercourse with the enemy assumes that the commerce is transacted after war has broken out."<sup>1</sup> With a potential enemy there is no prohibition of intercourse, nor are the courts entitled "to invent doctrines of public policy in such matters." Since the property in the latex had passed to the claimants, the obtaining of delivery by the claimants' warehousemen from the Port of London Authority was not obtaining goods from an enemy, but obtaining his own goods by a British subject from British bailees.<sup>2</sup> The goods were not seized *in transitu*, but from the claimants' warehousemen who had taken them into store. The claimants took "actual delivery . . . in the only way in which, as a matter of practical business, in their individual circumstances, they could take actual delivery of the goods."<sup>3</sup>

(f) The court may take judicial notice of "*the totalitarian character of the German Government and its practice of taking for its own use, or for disposal in whatever way would best help the war effort any goods imported into Germany.*"<sup>4</sup>

In *The Glenroy* (No. 2), no need arose to resort to judicial notice, for in an earlier prize case German decrees had been proved whereby certain commodities, on importation, automatically became the property of the German Government. In that case it was held, on the facts, that the beans—conditional contraband, i.e., contraband if it were proved that they were for the use of the enemy government or its armed forces—had ceased to be destined, in fact, for an enemy port and, at the date of seizure, were not lawful prize.

In *The Conservas Cerqueira Case*,<sup>5</sup> the Prize Court, said Lord Wright, in order to establish a reasonable case of suspicion, may take judicial notice of the fact that a large consignment of tinned fish is calculated to increase the total war effort of Italy, whether intended for the armed forces or for the civilian population. The court may take similar notice of the fact that a Spanish decree forbidding the export of contraband to Italy may be, and is, frequently evaded. The position of Genoa as a war base of supplies in Italy, and the practice of the Italian Government to take the goods for its own use or for disposal in the war effort, are "matters of common notoriety which, as on

<sup>1</sup> [1941] P., at 61: cf. *The Janson Case* [1902] A.C. 484, 497, 500.

<sup>2</sup> [1941] P., at 62.

<sup>3</sup> *Ib.*, 65.

<sup>4</sup> *Per* Lord Merriman, P., in *The Glenroy* (No. 2) [1944] P. 11, 22.

<sup>5</sup> [1944] A.C. 12, 13.

one occasion Lord Stowell said, could be acted on by the judge in a prize court."<sup>1</sup>

## 2. *Payment to or for benefit of Enemy*

(a) A surety may lawfully pay an insurance company the premiums on a policy of life insurance effected by a person who has since become an alien enemy, and has been assigned by him to the company by way of mortgage with a covenant by the sureties to repay the loan and to pay the annual premiums. If he pays the amount due on the mortgage he is entitled to an assignment of the policy without reservation: *Seligman v. Eagle Insurance Co.*<sup>2</sup>

The policy is not void: the right of the policy-holder is suspended during war.

"No benefit can accrue to the enemy alien at all," said Neville, J., "as the result of the payment of his premium; but what will result is that perhaps some day somebody who is not an enemy alien may have a right to sue the company for the amount assured."

(b) "No crime is committed by making a payment to a third person, which merely improves the position of an enemy by giving him further security that he will ultimately recover the money. and without an intention that the enemy, while such, shall benefit by it as a payment": *Schmitz v. Van der Veen & Co.*<sup>3</sup>

S, a naturalised British subject, sued a London firm for the price of goods sold and delivered before the outbreak of war. He had ordered goods from A, an alien enemy in Germany, selling them in London at the list price above a minimum and dividing the excess equally between himself and A and receiving a commission. S paid A only if he himself received payment; A took the risk of buyer's default. Rowlatt, J., held that the defendants bought the goods from S as a principal. The defendants then contended that the action was "for the benefit of" an enemy. S was willing that there should be a stay to take out a summons to vest in the Custodian the sum recovered. The defendants argued that payment would benefit A: it made his chance of recovering after the war more secure.

In one sense, said Rowlatt, J., the action was clearly for A's benefit: payment to S created an obligation to remit the money

<sup>1</sup> Citing also *The Rosalie and Betty* (1800), 2 C. Rob. 343, 344, *per* Lord Stowell: judges of Prize Courts "are not to shut their eyes to what is generally passing in the world . . . ; not to consider them at all (*sc.* "matters of frequent and not unfamiliar occurrence") would be not to do justice."

<sup>2</sup> [1917] 1 Ch. 519, 526. The validity of this decision has been doubted by reason of the wide words of s. 1 (2) (a) (ii) of the Trading with the Enemy Act, 1939.

<sup>3</sup> (1915), 84 L.J.K.B. 861, 865, *per* Rowlatt, J.

paid to A, less his own claim for half profits and commission. Unless, however, S did in fact remit. A would not obtain the benefit of payment.

"It is essential to distinguish carefully between these two cases—that is to say, that where the cause of action is unexceptionable, but the plaintiff as an alien enemy is temporarily and personally incapable of being received as a plaintiff, and that where the cause of action, whoever puts it forward, fails in itself, and fails finally."<sup>1</sup>

Thus, where the claim accrued before the plaintiff became an enemy, a non-enemy who is otherwise entitled to sue, may bring an action upon it, e.g., upon a bill, as trustee for an alien enemy of part of the proceeds.<sup>2</sup> "If there is any objection, it is at a later stage, namely, as to the payment over of the proceeds after the action by the plaintiff to the enemy."<sup>3</sup> Here, the claim of S accrued before the war; at common law he was entitled to recover. Nor would the payment be "for the benefit of" an enemy, within the statute: there was no intention that *while an enemy* he should benefit by such payment: he merely received further security that he would ultimately recover the money.

This decision Singleton, J., followed in *Weiner v. Central Fund for German Jewry*.<sup>4</sup> In June, 1939, a British subject had deposited with the defendants a sum of money to help two refugees to come from Vienna to England. Alleging that the defendants had taken no steps to secure the admission to this country of those refugees, the plaintiff claimed the return of his deposit as upon a consideration which had totally failed. The defendants put in issue the plaintiff's right to sue, saying that the action was for the benefit of an alien enemy. The plaintiff, by his counsel, admitted that he had no right to the money, but agreed that any sum recovered should be paid to the Custodian. Singleton, J., gave judgment for the plaintiff and made an order in the same form as in *Schmitz v. Van der Veen*.

How far these decisions can stand after *The Sorfracht Case* may need to be reconsidered.<sup>5</sup>

<sup>1</sup> *Ib.*, 864, citing *per* Ellenborough, C.J., in *Flindt v. Waters* (1812), 15 East 269, 265: "But the defence of alien enemy must be accommodated to the nature of the transaction out of which it arises: it may go to the contract itself on which the plaintiff sues, and operate as a perpetual bar; or the objection may, as in a case of this sort, be merely personal, in respect of the capacity of the party to sue upon it."

<sup>2</sup> *Daubuz v. Morshead* (1815), 6 Taunt. 532, *per* Gibbs, C.J.

<sup>3</sup> 84 L.J.K.B., at 864.

<sup>4</sup> (1941), 2 All E.R. 29.

<sup>5</sup> See *McNair*, 49, 327; [1943] A.C. 203, 212.

### 3. *Performing Obligation of, or Discharging Obligation to, Enemy*

This prohibition, Macnaghten, J., has held

"cannot apply to a case where an English company, having given a guarantee of the debt of an enemy, performs its obligation under the contract of guarantee; for this would lead to the absurd result that although a creditor might receive payment from the enemy, yet he cannot receive payment from a British subject who has guaranteed the debt of the enemy." : *R. & A. Kohnstamm, Ltd. v. Ludwig Krumm (London), Ltd.*<sup>1</sup>

The plaintiffs, an English leather company, had dealings for several years with Ludwig Krumm A.G., a German company who manufactured leather goods at Offenbach. Ludwig Krumm (London), Ltd., the defendants, who also dealt in leather, were an English company, nearly all the shares of which were held by the German company. The German company appointed the defendants as their English agents to buy leather and to sell their goods. In January, 1936, owing to German exchange difficulties, the plaintiffs obtained from the defendants a written guarantee of payment for goods to be supplied by carrier to the German company. The present action was brought in September, 1939, upon the guarantee for the price of parcels of leather sold and delivered before the war to the German company. The assets of the defendant company were vested in the Custodian. The defendants pleaded, *inter alia*, that payment was prohibited under the Trading with the Enemy Act; it would amount to a discharge of the obligations of the German company within s. 1 (2) (a) (iii).

Macnaghten, J., referring to proviso (ii), said that the plaintiffs, who had performed all their obligations to the German company, would not be deemed to have traded with the enemy if they received payment of this debt from the German company. Hence s. 1 (2) (a) (ii) could not apply for, otherwise, though the creditors might lawfully receive payment from the enemy, he could not receive payment from a surety for the enemy. Although in one sense, the defendants, by paying, "discharge" the German company from its obligation to pay the plaintiff, they create an obligation on the German company to pay the sum to them.

"... I think the words 'discharged any obligation' mean a complete discharge, not a mere transfer of the obligation to pay this sum of money from an obligation to pay it to A into an obligation to pay it to B. The obligation of the German company, the obligation of the enemy, has not been discharged. It has still to be met."<sup>2</sup>

<sup>1</sup> [1940] 2 K.B. 359, 364.

<sup>2</sup> *Ib.*, 364.

It is respectfully submitted that the reasoning is doubtful. No relevant authorities appear to have been cited to the court, and the judgment was not considered. The material words of the prohibition are, "discharge *any* obligation of" an enemy. It is true that on payment by the surety, the German company became under a duty to pay the surety. But the obligation to pay the plaintiffs became discharged.<sup>1</sup>

#### IV. CUSTODIANS OF ENEMY PROPERTY

##### 1. *Statutory Provisions*

To prevent the payment of money to enemies and "in contemplation of arrangements to be made at the conclusion of peace," the Board of Trade was empowered to appoint "Custodians of Enemy Property" for the *collection of enemy debts and the custody of enemy property*.<sup>2</sup>

"He does not receive such money as agent for the enemy.

He has certain limited powers of dealing with it, but, apart from that, the beneficial ownership is to be regarded as in statutory suspense."<sup>3</sup>

"Enemy property" means "any property for the time being belonging to or held or managed on behalf of an *enemy* or an *enemy subject*."<sup>4</sup> Property paid to or vested in a custodian is, pending its disposition at the conclusion of peace, "removed from the control and from the beneficial ownership of the enemy"; "the beneficial ownership (is) and (remains) in statutory suspense or abeyance"; the Custodian has "certain limited powers of dealing with the property."<sup>5</sup> The Board is given power to make an order dealing with the following subjects, and containing such "incidental and supplementary" provisions as appear "necessary or expedient":—

(a) *Payment* to the prescribed Custodian of money due to or for the benefit of an enemy;

(b) *Vesting* in him prescribed enemy property;

(c) *Vesting* in him the right to transfer other enemy property not vested in him;

<sup>1</sup> It would appear that Sir Wilfrid Greene, M.R., in *The Schering Case* [1941] 1 K.B. 424, 440, doubted the decision, though he declined to express any opinion. And see McNair, 178, 179.

<sup>2</sup> Trading with the Enemy Act, 1939, s. 7.

<sup>3</sup> In *re Gourju's Will Trusts* [1943] Ch. 24, 29, per Simonds, J.

<sup>4</sup> *Ib.*, s. 7 (8) (a). It does not include a "credit balance" on a running account between an enemy and a bank; no vesting order could be made: *In re Bank für Handel und Industrie* [1915] 1 Ch. 848, 850, per Warrington, J. See Younger, J.'s exposition in *Re Ruben* [1915] 2 Ch. 313, 319–321, where the applicant was not "interested" in enemy property, but claimed that the whole property was his own, viz., insurance policies on the lives of British subjects, deposited abroad with an alien enemy, as security. A vesting order was refused.

<sup>5</sup> In *re Minister (Enemy)* [1920] 1 Ch. 268, 278, 279, per Russell, J.



(d) *Conferring* rights and imposing duties on Custodians relating to: (i) property vested, (ii) property of which the right to transfer has been vested, (iii) other enemy property, (iv) money paid or to be paid to a Custodian:

(e) *Payment* of prescribed fees;

(f) Requirement of returns.<sup>1</sup>

A person who complies with the requirements or directions of a Custodian, accompanied by his certificate that the money or property comes within an order under s. 7, will be protected from legal proceedings arising solely from this compliance; the certificate will be evidence of the facts stated.<sup>2</sup>

Where, under such an order, money is paid to a Custodian, any property or the right to transfer property is vested in him, or a direction is given by him relating to property within the order—

(i) the fact that a person interested (or who might have been interested) in the money or property, and who was an enemy or enemy subject, had died or changed his enemy status, or

(ii) the fact that some person so interested was wrongly believed by the Custodian to be an enemy or enemy subject—neither of these facts, by itself, will invalidate either the payment, or the vesting, or the direction, or any consequential proceedings.<sup>3</sup>

To pay a debt or deal with any property to which an order under s. 7 applies, otherwise than under the order, is an offence, and the payment or dealing is void.<sup>4</sup> Such a payment will be no answer to a claim therefor by the Custodian.<sup>5</sup>

## 2. Custodian Order, 1939

The Board of Trade, under s. 7, made *The Trading with the Enemy (Custodian) Order, 1939*.<sup>6</sup>

(a) The order specifies the *moneys payable to the Custodian*,<sup>7</sup> without prejudice to the generality of the duty to pay him moneys which would otherwise be payable to or for the benefit of an enemy. Money which, but for ss. 4 and 5, would be payable to any purported assignee, transferee or allottee, must be paid to the Custodian.<sup>8</sup> Payment should be made (a) within

<sup>1</sup> Trading with the Enemy Act, 1939, s. 7 (1).

<sup>2</sup> *Ib.*, s. 7 (2).

<sup>3</sup> *Ib.*, s. 7 (3).

<sup>4</sup> *Ib.*, s. 7 (5).

<sup>5</sup> *Re Aramayo Francke Mines, Ltd.* [1921] 1 Ch. 675, 686, *per* Russell, J.

<sup>6</sup> S.R. & O., 1939, No. 1198, amended by S.R. & O., 1940, Nos. 94 and 734; 1941, No. 765; 1943, No. 342. The order came into force on 18th September, 1939. Krusin & Rogers, 257-263; II, 369-371; III, 95, 96. See *infra*, 228.

<sup>7</sup> *Ib.*, art. 1 (ii) (a) to (i).

<sup>8</sup> *Ib.*, art. 1 (iii).

fourteen days of the order if the money has previously become payable or would, but for the war, have become payable; or (b) within fourteen days after the creditor becomes an enemy if the money has become payable or would, but for the war, have become payable; or (c) within fourteen days after the day when the money became payable or would, but for the war, have become payable; or (d) where money would otherwise be payable in a foreign currency to or for the benefit of an enemy (other than where the contract provides for a specified rate of exchange), in English currency at the middle official rate fixed by the Bank of England on the date when payment became due, or the middle rate for telegraphic transfers in London on that date, or if there was no such rate on that date, at the rate determined by the Treasury.<sup>1</sup> The article does not apply to payments authorised to be made to some other person, by a Secretary of State, the Treasury, or the Board of Trade, or to a clearing office under s. 1 of the Debts Clearing Offices and Import Restrictions Act, 1934.<sup>2</sup>

(b) The Board has a discretion to vest in the Custodian prescribed enemy property, or the right to transfer prescribed enemy property.<sup>3</sup> Such a "vesting order" will have the same effect as a vesting order under the Trustee Act, 1925.<sup>4</sup> The order vesting shares in a Custodian "carried with it the right to exercise the ordinary rights of a shareholder"<sup>5</sup> and to dividends.<sup>6</sup>

(c) The Custodian will hold money, property and the right to transfer property vested in him (subject to art. 4 and any directions of the Board), until the end of the war, and will then deal with these as the Board will then direct.<sup>7</sup> Under the directions of the Board (general or special), he may, in his absolute discretion, pay any money or transfer property to or for the benefit of any person who, but for the Act or any order, would have been entitled to them, or to any person appearing to him to be authorised by that person to receive them.<sup>8</sup>

<sup>1</sup> *Ib.*, art. 1 (iv), amended by S.R. & O., 1940, No. 94; 1941, No. 914, *infra*, 228.

<sup>2</sup> *Ib.*, art. 1 (v).

<sup>3</sup> *Ib.*, art. 2 (i).

<sup>4</sup> *Ib.*, art. 2 (iii).

<sup>5</sup> *In re Pharaon et Fils* [1916] 1 Ch. 1, 8, *per* Bankes, L.J.

<sup>6</sup> *In re Aramayo Francke Mines, Ltd.* [1921] 1 Ch. 675, 680, *per* Russell, J.

<sup>7</sup> Trading with the Enemy (Custodian) Order, 1939, art. 3 (i).

<sup>8</sup> *Ib.*, art. 3 (ii); see Krusn & Rogers, 260; "the Custodian is not by the Act required to pay any debts unless he shall so think fit; *a fortiori* he is not required to pay all debts": *per* Younger, J., in *Re Fried Krupp Aktiengesellschaft* [1916] 2 Ch. 194, 200.

An action by the Custodian to wind up an enemy firm with an English partner was dismissed on the ground that the German partners were necessary parties to the action. The Custodian is merely an assignee, and it was necessary for the proper liquidation of the firm's affairs that each partner should personally account: *Public Trustee v. Elder* [1926] Ch. 776, 791, *per* Sargant, J.

Without the Board's consent, save as directed by this order, no person may deal with an enemy's property.<sup>1</sup>

(d) The duty is imposed upon *any person*, who holds or manages for or on behalf of an enemy any property, to communicate that fact in writing to the Custodian and to furnish him with *returns, accounts and information, and to produce such documents* as the Custodian may require.<sup>2</sup> A similar duty is imposed upon an *enemy subject* or any person who holds or manages property for or on behalf of an enemy subject.<sup>3</sup> *Every company* incorporated in the United Kingdom, and any company which has a share transfer or share registration office in the United Kingdom, must, within fourteen days of this order, communicate to the custodian particulars of shares and other securities held by or for the benefit of an enemy; if the holder or person for whose benefit the securities are held subsequently becomes an enemy, the company should, within fourteen days of that event, make a similar communication to the Custodian.<sup>4</sup> *Every partner* of a firm—of which a partner, before 18th September, 1939, has become an enemy, or to which a person who so became an enemy has lent money for its business—must, within fourteen days of this order, communicate to the Custodian particulars of the share of profits or interest due to that enemy; and similar communication should be made if a partner or the lender becomes an enemy subsequently.<sup>5</sup>

(e) Where a Custodian proposes to sell stock or shares or securities vested in him by vesting order, the *company* may, with the Board's consent, *buy back the stock, shares or securities and reissue them*.<sup>6</sup> Where the Custodian executes a transfer of stock and shares or securities which he is empowered to transfer, the company must register the transfer upon his request and upon the receipt of the executed transfer from the Custodian, even though he is not in possession of the documents of title; but this registration will not affect a lien or charge in favour of the company or other body, or a lien or charge of which the Custodian has notice.<sup>7</sup>

<sup>1</sup> *Ib.*, art. 4.

<sup>4</sup> *Ib.*, art. 5 (in).

<sup>2</sup> *Ib.*, art. 5 (i).

<sup>5</sup> *Ib.*, art. 5 (iv).

<sup>3</sup> *Ib.*, art. 5 (ii).

<sup>6</sup> *Ib.*, art. 6 (i).

<sup>7</sup> *Ib.*, art. 6 (ii).

The Custodian of Enemy Property for England was Sir Ernest FASS (Public Trustee Office, Kingsway, W.C.2). During the last war the Public Trustee was constituted the Custodian. Sir Ernest Fass was appointed Custodian in his personal capacity, not in his capacity as Public Trustee. See argument of Mr. Victor Russell in *In the Estate of San Pietro, deceased* [1941] P. 16, 17, and the judgment of Sir Boyd Merriman, P., at 19. The Custodian has no power to accept grants of administration to the estates of deceased persons where enemy interests are involved. In such a case the court gave a grant *ad colligenda bona* to the Public Trustee at the Custodian's request. Mr. Reginald Ramson Whitty is the new Custodian.

### 3. Subsequent Custodian Orders

(a) by *The Trading with the Enemy (Investment) Order, 1940*, the Custodian may invest moneys received in the purchase of *Treasury Bills or Government securities* specified by the Board from time to time.<sup>1</sup>

(b) By *The Trading with the Enemy (Insolvency) Order, 1940*, upon winding-up or bankruptcy, or the making of a deed of arrangement or composition, or scheme, the *benefit of all debts and claims* which would otherwise be provable by an enemy, and all securities therefor, forthwith vest in the Custodian, who may prove and compromise disputed matters and take such proceedings as he thinks fit.<sup>2</sup> The liquidator or trustee in bankruptcy or trustee under any deed of arrangement or composition or scheme must, within fourteen days of the facts coming to his knowledge, make a return to the Custodian of all debts and claims vested in the Custodian and provable, and produce such accounts and documents as the Custodian may require.<sup>3</sup> The same applies to a debtor who proposes to make a composition or scheme.<sup>4</sup>

(c) By *The Trading with the Enemy (Custodian) Amendment (No. 2) Order, 1941*, para. 7 of the Custodian Order, 1939 (which relates to the Custodian's fees), does not apply to money paid to the Custodian under para. 1, in respect of persons resident or carrying on business in the Channel Isles.<sup>5</sup>

(d) By *The Trading with the Enemy (Liabilities Adjustment) Order, 1941*, where an application is made to a liabilities adjustment officer for advice and assistance, or to the court for adjustment and settlement of the affairs of any person, the Custodian, in relation to any debt or claim which would otherwise be provable by an enemy, can prove in such proceedings and assent to a scheme of arrangement under the Act, assent to a variation of the terms of any lease, mortgage or contract, and take such proceedings as he thinks fit under the Liabilities Adjustment Rules.<sup>6</sup>

(e) By *The Trading with the Enemy (Custodian) (No. 3) Order, 1942*, para. 1 of the Custodian Order, 1939, does not apply to any money which, but for war, would be payable by a bank to or for the benefit of—

(i) an individual who is an enemy only because he resides in enemy-occupied territory, being one of the territories specified in the Schedule ;

(ii) any body of persons (corporate or unincorporate) trading in any place which is an enemy only because it is controlled by a person residing in such territory ;

<sup>1</sup> S.R. & O., 1940, No. 1113, art. 1.

<sup>2</sup> *Ib.*, art. 3.

<sup>3</sup> S.R. & O., 1940, No. 1419, arts. 1 and 2.

<sup>4</sup> *Ib.*, art. 4.

<sup>5</sup> S.R. & O., 1941, No. 896.

<sup>6</sup> S.R. & O., 1941, No. 2071, art. 1.

(iii) *any individual or body of persons* (corporate or unincorporate), being an enemy *only through carrying on business* in such territory.<sup>1</sup>

A bank crediting interest on any such money will not, by this fact alone, be deemed to have traded with the enemy.<sup>2</sup>

(f) By *The Trading with the Enemy (Custodian) (China) Order, 1943*, art. 1 of the Custodian Order, 1939 (requiring payment to the Custodian of moneys payable to or for the benefit of an enemy), will *not apply* (unless in any particular case the Board of Trade directs otherwise) to any money which, but for war, would be *payable by any banker* to or for the benefit of any *individual or body of persons* (corporate or unincorporate) *resident or trading in any area of China (excluding Manchuria) occupied by the enemy*. If an individual or body of persons traded in any such area and also in other enemy territory, the order applies only to such money as is payable for the business carried on in such area.<sup>3</sup>

(g) By *The Trading with the Enemy (China Custodian) Order in Council, 1944*, the Trading with the Enemy Act, 1939, was extended (under s. 14) to all property, money or assets already held by or vested in the Custodian of Enemy Property for China (appointed under s. 14, while His Majesty still held jurisdiction in China).<sup>4</sup> *This Order was not made under the Act.*

#### 4. Office of Custodian

(a) *At common law His Majesty has the right to claim, after office found, as forfeited to himself, all debts and choses in action within the realm owing or belonging to any enemy.*<sup>5</sup> The powers

<sup>1</sup> S.R. & O., 1942, No. 542, art. I. The territories scheduled are: Channel Islands; Hong Kong; Straits Settlements; Federated Malay States of Perak; Negri Sembilan; Selangor; Pahang; Unfederated Malay States of Johore; Kedah; Perlis; Kelantan; Trengganu and Brunei; Sarawak; North Borneo; Burma.

<sup>2</sup> *Ib.*, art. 3. For further Orders, see 1944, Nos. 914, 915. *Infra*, 228.

<sup>3</sup> S.R. & O., 1943, No. 1417.

<sup>4</sup> S.R. & O., 1944, No. 100.

<sup>5</sup> *In re Ferdinand, ex-Tsar of Bulgaria* [1921] 1 Ch. 107, 143, *per* Younger, L.J.; 124, *per* Lord Sterndale, M.R. See also *Porter v. Freudenberg* [1915] 1 K.B. 857, 889, *per* Lord Reading, C.J., and references to English institutional writers, e.g., Hale, *Pleas of the Crown*, i, 195: "debts and goods found in this realm belonging to alien enemies belong to the King and may be seized by him."

See the very learned and exhaustive essay of Farrer, *The Forfeiture of Enemy Private Pre-war Property* (1921), 37 L.Q.R. 218-241, 337-362.

See Mullins, *Private Enemy Property*, Transactions of the Grotius Society (1923), vol. VIII, 89-104. He examines the position, first at common law, and then under the peace treaties made after the last war. Every British debtor had to pay his enemy debts in full and with interest. A similar duty was imposed upon ex-enemies (98). Mutual indebtedness was settled through clearing houses. Each government guaranteed the payment of its nationals' debts. The ex-enemy governments undertook to restore the property, rights and interests of the nationals of Allied and Associated Powers. By Orders in Council implementing

conferred by the Trading with the Enemy Act, 1939, are inconsistent with this right: "a power to vest property in a Custodian to be dealt with at the end of the war as His Majesty should by Order in Council direct is inconsistent with an intention of preserving a power to insist on an absolute forfeiture at common law."<sup>1</sup> The Act is "without prejudice to the exercise of any right or prerogative of the Crown,"<sup>2</sup> but the preamble to s. 7 contemplates that forfeiture will not be exercised.

"I cannot doubt that the Act" (*sc.* of 1914), said Younger, L.J., "was intended while it was in operation to supersede the prerogative right of forfeiture."

Subject to legislation or the Treaty of Peace, enemy property in this country will be restored to its owners.<sup>3</sup>

A foreign ordinance confiscating the property of English subjects abroad will not be recognised in this country, as not being conformable to the usage of nations: "The penal laws of foreign countries are strictly local, and affect nothing more than they can reach and what can be seized by virtue of their authority."<sup>4</sup> A German ordinance prohibiting the payment of interest was not recognised in an English court.<sup>5</sup>

(b) The Board of Trade exercises, by order, the power to vest property in the Custodian. During the War of 1914, procedure was by application to the court by the Custodian.

Younger, J., thus stated the principles of the submission of creditors' claims and of the making of vesting orders, in *Re Ling & Duhr*.<sup>6</sup>

"... I have always considered it to be the duty of the court to see that no claim on the part of a creditor is admitted unless he is able to satisfy the court with the most reasonable certainty that it is due. First of all, ... this Act is not an Act primarily for the benefit of creditors at all; its main purpose is to create a fund to be protected and preserved in accordance with the terms of the preamble, with a view to such arrangements after the war as may seem good to His Majesty in

the treaty, all property, rights and interests of ex-enemies in England were charged with payment of claims by British nationals with regard to their property in the enemy country and with payment of compensation done by such enemy "by exceptional war measures" (the amount to be settled by Mixed Arbitral Tribunals) and with payment of similar British claims against the countries allied to such enemy.

<sup>1</sup> [1921] 1 Ch., at 131, *per* Lord Sterndale, M.R.

<sup>2</sup> Section 16. See [1921] 1 Ch., at 141, *per* Warrington, L.J.

<sup>3</sup> *Ib.*, 148, referring to Lord Parker's judgment in *The Daimler Case* [1916] 2 A.C. 307, 347.

<sup>4</sup> *Wolff v. Oxholm* (1817), 6 M. & S. 92, 99, *per* Lord Ellenborough, C.J. See 103-105 criticising the right to confiscate. *Sed quare.*

<sup>5</sup> *Re Fried Krupp Aktiengesellschaft* [1917] 2 Ch. 188, 193, 194, *per* Younger J.

<sup>6</sup> [1918] 2 Ch. 298, 301.

Council, and the intermediate payments out of the fund to creditors are merely incidental and discretionary."<sup>1</sup>

There must be evidence, "beyond reasonable doubt," that the debt is due and that it has not been paid or satisfied under emergency legislation in enemy territory.

With the same desire to protect debtors against claims which may have been satisfied in the enemy country, though the fact cannot be established,

"When an application is made to vest in the Custodian debts which are alleged to be due from a person resident or carrying on business in this country to an enemy, and it has been alleged by the debtor that the debt may have been already paid in Germany by means of funds of his in that country vested in a German custodian, we always follow the principle of assuming to a certain extent in favour of such a debtor that the debt may have been paid thereout, taking care that he is not by virtue of this procedure called upon to pay it twice over. On the other hand, we do not allow the central fund to stand the risk of being depleted should the debt not have been paid."<sup>2</sup>

A special form of order called the *Freudenberg* Order, was used providing that, although vested, the debt was not to be applied or disposed of without notice to the debtor. The debt was frequently allowed to remain in the debtor's hands "to spare British industry all possible inconvenience."<sup>3</sup>

The *Blydenstein* Order was to preserve any lien, charge, or set-off which the English debtor may have against the debt owing by him.<sup>4</sup>

##### 5. "*Alien Property Custodian*" in United States

On 11th March, 1942, the President made an Executive Order establishing the office of Alien Property Custodian.<sup>5</sup> He is given wide powers, and is authorised "to take such action as he deems necessary in the national interest," including the power to merge any business enterprise within the United States, which is a national of a "designated enemy country." The Secretary of the Treasury and the Custodian are empowered, jointly or severally, to prescribe regulations, rulings and instructions to carry out the purposes of the Executive Order. Any determination by the Custodian that any property or interest belongs to a designated enemy country or national is "final and conclusive" as to his power to exercise his authority.

<sup>1</sup> [1918] 2 Ch., at 300.

<sup>2</sup> *Ib.*, 302, for form of order.

<sup>3</sup> *Ib.*, 301.

<sup>4</sup> *Ib.*, 303, for form of order.

<sup>5</sup> Executive Order No. 9095, amended by Executive Order No. 9193, ss. 1, 2 (a), 4, 10 Text, Domke, App. K, 458-464.

The Alien Property Custodian issued regulations relating to property vested in him.<sup>1</sup> A committee of three, called the Vested Property Claims Committee, is empowered to hear claims relating to property vested in the Custodian who, after examining its findings and recommendations, issues his decision and takes action to effectuate such decision. His decision is final and not subject to judicial review.<sup>2</sup>

Apparently, even American citizens resident in the United States may be declared "nationals" of a "designated enemy country," and their assets may be vested in the Custodian.<sup>3</sup> "Anyone's assets in this country, even those of American citizens living here, may be seized if the Alien Property Custodian makes the determination, not reviewable by the courts, that such seizure is in the interest of the United States."<sup>4</sup> Thus, in *The Draeger Case*,<sup>5</sup> an American citizen, naturalised in 1898 and continuously residing in the United States, was determined by Vesting Order a national of a designated enemy country, Germany. He held the whole stock in a company on behalf of a German firm trading in Germany and controlled by the Deutsche Reichsbahn Gesellschaft. The American Corporation and the stockholders were accordingly declared by the Custodian to be nationals of Germany and the business was liquidated. The court stayed the liquidation pending the determination whether they were nationals of a foreign or enemy country or whether the property was owned or controlled by a foreign or enemy country, or a national thereof.<sup>6</sup>

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<sup>1</sup> Issued under the authority vested in him by the President under s. 5 (b) of the Trading with the Enemy Act, 1917, amended by s. 301 of the First War Powers Act, 1941, which gave the President flexible powers operating *through such agency as he might choose*, to deal with alien property. Text, Domke, App. L, 465, 466.

<sup>2</sup> Domke, 265.

<sup>3</sup> Domke, 254. See also Turlington, *Vesting Orders under the First War Powers Act*, 1941, *A.J.I.L.*, vol. 36 (1942), 460-465.

<sup>4</sup> Domke, 266.

<sup>5</sup> *Draeger Shipping Co. Inc. and Frederick Draeger v. Crowley, as Alien Property Custodian* (1943), Am. Mar. Cas. 256 cited by Domke, 266, 267.

<sup>6</sup> See generally, Sommerich, *Recent Innovations in Legal and Regulatory Concepts as to the Alien and his Property*, *A.J.I.L.*, vol. 37, (1943), 58-73.

See also Littauer, *Confiscation of the Property of Technical Enemies*, Yale L. Journ. (1943), vol. 52, 739-770, at 763-770. Business enterprise owned by alien funds may be vested if the Custodian determines that this action is "necessary in the national interest." And see Meyer, *Co-ordination of Allied Enemy Property Departments*, vol. XXXVI (1944) Journ. Comp. Leg., 51-55.

And see Carroll, *Legislation on Treatment of Enemy Property*, *A.J.I.L.*, vol. 37 (1943), 611-630, who compares provisions in belligerent countries affecting business property. The United States has no comprehensive legislation, but has issued a wide range of proclamations and executive orders. The Alien Property Custodian is under the President's direct control. In him are vested all the powers conferred upon the President by ss. 3 (a) and 5 (b) of the Trading with the Enemy Act, 1917 except the freezing control powers which remain in the Treasury Department (ib.).



*Postscript*

Among the orders noted or made after this chapter was in proof, are the following :—

(a) *The Trading with the Enemy (Custodian) (Amendment) Order, 1944* (S.R. & O., 1944, No. 914), providing for payment in certain circumstances of moneys due to the Custodian either in the foreign currency in which they arise, or in sterling, converted at the official buying rate of exchange fixed by the Bank of England as the Custodian may require.

(b) *The Trading with the Enemy (Foreign Currency Accounts) Order, 1944* (S.R. & O., 1944, No. 915), vesting in the Custodian the rights in foreign currency balances standing in the books of any banker in the United Kingdom in the names of certain enemies (enemies through residence or incorporation in a State at war with H.M., or through control by such persons).

(c) *The Trading with the Enemy (Enemy Territory Cessation) Order, 1944* (S.R. & O., 1944, No. 1416), removing from the category of enemy territory, the territory formerly known as *Italian East Africa, Cyrenaica, Tripolitania*.

(d) *The Trading with the Enemy (Custodian) Order, 1945* (S.R. & O., 1945, No. 43), vesting in the Custodian all rights relating to the transfer of securities belonging to or held to account of persons residing or trading in areas under the sovereignty of a power with whom H.M. is at war, or controlled by such persons. Such transfer is forbidden except under arrangements authorised by the Custodian or the Trading with the Enemy Department of the Board of Trade.

See also the following, which removed, after 1st February, 1945, certain obstacles in the way of trading with persons residing in *Belgium* :—

(e) *The Trading with the Enemy (Authorisation) Order, 1945* (S.R. & O., 1945, No. 911).

(f) *The Trading with the Enemy (Transfer of Negotiable Instruments, etc.) Order, 1945* (S.R. & O., 1945, No. 92).

(g) *The Trading with the Enemy (Custodian) (Amendment) Order, 1945* (S.R. & O., 1945, No. 93).

(h) The orders made under s. 15 (1A) relating to the following countries have been revoked :—

France (unoccupied zone) (15th July, 1943); French Somaliland (10th March, 1943); Monaco, Yugoslavia, Greece (24th November, 1944).

## PART II

### WAR AND COMMERCIAL CONTRACTS

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### CHAPTER VI

#### AGENCY

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#### 1. *Continuing Agency Abrogated by War*

(a) A contract of agency, one of the parties to which becomes an alien enemy, is *abrogated by war*. Such a contract, involving intercourse with the enemy, is prohibited, "except with the permission, express or implied, of the executive authority of the State."<sup>1</sup>

(b) The Proclamation of 9th September, 1914, permitted dealings with a "branch" of an enemy firm, "locally situated in British, allied or neutral territory, not being neutral territory in Europe."<sup>2</sup> The Trading with the Enemy Act, 1939, contains *no such exception*.

(c) An *irrevocable power of attorney to sell land* and to give receipts for the purchase-money, it was held in *Tingley v. Müller*, is not avoided if the donor of the power subsequently becomes an alien enemy; no intercourse with the enemy is

<sup>1</sup> *Per Warrington, L.J.*, in *Tingley v. Müller* [1917] 2 Ch. 144, 166.

<sup>2</sup> *In re Continho, Caro & Co., Enemy* [1918] 2 Ch. 384, 390.

involved.<sup>1</sup> *But this decision is doubtful*; and Lord Wright approved the "powerful" dissenting judgment of Scrutton, L.J.<sup>2</sup>

## 2. Effects of Abrogation

(a) The right of an agent who has become an alien enemy to the return of his property is *suspended* during war and *revives* upon the restoration of peace.<sup>3</sup>

(b) An agent in this country of a principal who is an alien enemy, notwithstanding a pre-war power of attorney, is not entitled to collect debts due to him or to pay debts due from him; nor is he entitled to the appointment of a receiver of the assets of his principal's business in this country; he can have *no greater right than his principal*.<sup>4</sup>

## 3. Where Party is Alien under Protection

A contract of agency, one of the parties to which becomes an alien enemy who is licensed, e.g., by registration to reside under the King's peace, is *unaffected*.<sup>5</sup>

## 4. New Contract of Agency, Illegal

It is illegal during war to enter into a contract of agency with an alien enemy or on his behalf:

"No active business can be maintained, either personally or by correspondence, or through an agent, by the citizens of one belligerent with the citizens of the other."<sup>6</sup>

A transaction originally unlawful cannot be made lawful by ratification.<sup>7</sup>

<sup>1</sup> See *Williams v. Payne* (1898), 169 U.S. 55, 70, 73, 74: "It is not every agency that is necessarily revoked by the breaking out of a war between two countries, in which the principal and agent respectively live . . . Whether it is revoked or not depends upon the circumstances surrounding the case and the nature and character of the agency." It may be questioned, however, whether this principle is not affected by Trading with the Enemy Act, 1939, s. 1 (2) (a).

See critical note on *Tingley v. Muller* in (1918), 31 Harv. L. Rev. 637-640: "The best rule, therefore, is to regard war as, at once and without regard to the knowledge or consent of the parties, terminating the relation." See also McNair, 206-209.

<sup>2</sup> *The Sovfracht Case* [1943] A.C. 203, 236.

<sup>3</sup> *Stevenson & Sons v. Aktiengesellschaft für Cartonnagen Industrie* [1918] A.C. 239, 245, per Lord Finlay, L.C.

<sup>4</sup> *Maxwell v. Grunhut* (1914), 31 T.L.R. 79, 80, per Lord Reading, C.J., delivering the judgment of the full Court of Appeal, followed by Warrington, J., in *Re Gaudig v. Blum* (1914), 31 T.L.R. 153.

<sup>5</sup> *Schostall v. Johnson* (1919), 36 T.L.R. 75.

<sup>6</sup> *Insurance Company v. Davis* (1877), 95 U.S. 425, 429, per Bradley, J.

<sup>7</sup> *United States v. Grossmayer* (1869), 9 Wallace 72, 75, per Davis, J. See Trotter, 59-63, for a summary of the transactions sustained by the American authorities (60. 61).

## CHAPTER VII

### PARTNERSHIP

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#### 1. *Dissolution, where Partners divided by War*

BY s. 34 of the Partnership Act, 1890—

“A partnership is in every case dissolved by the happening of any event which makes it unlawful for the business of the firm to be carried on or for the members of the firm to carry it on in partnership.”

A partnership is dissolved where partners, resident in different countries, are divided by war: *Esposito v. Bowden*.<sup>1</sup>

In 1853, the neutral owner of a ship then in a British port, and the defendant, a British subject, entered into a charterparty that *The Maria Christina*, a neutral ship, should proceed to Odessa, load a cargo of wheat and voyage to Falmouth. The defendant failed to load the cargo. In 1854, before the ship arrived at Odessa, England had declared war on Russia.

For a British subject, who has no commercial domicile in a neutral country, without licence to ship a cargo from an enemy port even in a neutral vessel, is a dealing with the enemy.<sup>2</sup>

“No partnership can subsist between the subjects of two hostile powers and, if two partners are resident in two different countries, their partnership is determined by a war between those countries.”<sup>3</sup>

<sup>1</sup> (1857), 7 El. & Bl. 763. See also *Mathews v. McStea* (1875), 91 U.S. 7, per Strong, J., a case arising out of the American Civil War: “... war ... dissolves commercial partnerships existing between the subjects or citizens of the two contending parties prior to the war, for their continued existence would involve community of interest and material dealing between enemies.” The rule applies to all such partnerships, whether “commercial,” or not.

<sup>2</sup> Willes, J., cites at 785, *Griswold v. Waddington* (1818), 16 John. 438: “A contract of partnership with a foreigner was absolutely dissolved by the breaking out of war between the two countries,” per Chancellor Kent.

<sup>3</sup> Lindley, 88; 2 Pitt Cobbett, 81, 82.

See the conclusive reasoning of Chancellor Kent in *Griswold v. Waddington* *supra*, at 489 *et seq.* See also *R. v. Kupfer* [1915] 2 K.B. 321, 338, per Lord, Reading, C.J.: “There can be no partnership between enemies of this country and a subject of this country when war has once been declared.”

## 2. *Alien Enemies under Protection*

"It is the place of his residence or trading, and not the place of his birth, or his personal attitude, which is of importance in this matter; and, therefore, if a foreigner comes over here, enters into partnership here and dwells here, and then war breaks out between this country and that of which he is a native, the partnership will not, nor will his rights as a partner (so long as he remains here with the permission of the Crown), be affected by the war any more than if he were an Englishman."<sup>1</sup>

## 3. *British Subjects Resident in Enemy Territory*

(a) "On the other hand, if a partnership consists wholly of Englishmen, some of whom reside here and some in another country, and war breaks out between that country and this, the partners abroad become enemies for all purposes of trade, just as much as if they were natives of the country in which they reside."<sup>2</sup>

A commission of bankruptcy, founded on the petition of a British subject resident in England, for a debt due to himself and his partners resident and trading in Flushing (then an enemy port), could not be supported: *McConnell v. Hector*.<sup>3</sup>

It is otherwise if his residence in an enemy country was licensed by the Crown: *Ex parte Baglehole*.<sup>4</sup>

(b) Similarly, partners will become enemies for all purposes of commerce, "even in the absence of any fixed residence in the belligerent country, if some of the partners go over there and trade there during the war."<sup>5</sup>

In *The Jonge Klassina*,<sup>6</sup> a licence had been granted for a limited purpose to R, a manufacturer of Birmingham, for the importation of certain goods from Holland (with whom England was then at war). On his return from Frankfurt, he went to Amsterdam (where he had an address) and exported goods. The transaction, Sir W. Scott held, was not licensed.

"A man," he declared, "may have mercantile concerns in two countries, and if he acts as a merchant of both, he must be liable to be considered as a subject of both with regard to the transactions originating respectively in those countries."

<sup>1</sup> Lindley, 89. See per Lord Reading, C.J., in *Porter v. Freudenberg* [1915] 1 K.B. 857, 868. See also *Wells v. Williams* (1697), 1 Salk. 46, *supra*, 142.

<sup>2</sup> Lindley, 90.

<sup>3</sup> (1802), 3 Bos. & P. 113, 114, per Lord Alvanley, C.J.

<sup>4</sup> (1812), 18 Ves. 525, 529, per Eldon, L.C.

<sup>5</sup> Lindley, 90.

<sup>6</sup> (1804), 5 C. Rob. 297, 302, 303.

Nor is a fixed establishment necessary to make a man a merchant of any place :—

“ If he is there himself, and acts as a merchant of that place, it is sufficient ; and the mere want of a fixed counting-house there, will make no breach in the mercantile character which may well exist without it.”

#### 4. Severance of Business Relations

“ The interest of a partner remaining in England in goods belonging to the house of business abroad would be liable to capture at sea and condemnation, unless he has taken immediate steps to sever his connection with that house at the outbreak of war.”<sup>1</sup>

It is for the British partners to show that on the outbreak of war they have taken prompt steps to sever their business relationship with the enemy partner.

“ An immediate discontinuance of trade and arrangements for removing, followed by actual removal within a reasonable time, unless detained by causes which might sufficiently account for not removing, would fix the intention to change the commercial domicile.”<sup>2</sup>

He will be allowed “ a reasonable interval during which he may discontinue or dissociate himself from the business in question.” If he has had this opportunity and has failed to take advantage of it, or “ if he has done some unequivocal act indicating an intention to continue or retain his interest in such business,” the goods will be condemned.<sup>3</sup>

#### 5. Enemy Partner as Formal Co-Plaintiff

An alien partner who has become an enemy may be joined as formal co-plaintiff in an action brought for the purpose of winding up the partnership affairs : *Rodriguez v. Speyer*.<sup>4</sup>

This case is probably not an authority “ beyond its precise facts.” The proper course is to obtain the necessary licence, or to have the claim vested in the Custodian of Enemy Property.<sup>5</sup>

#### 6. Enemy Partner's Share : Post-dissolution Profits

(a) Subject to the statute confirming the Treaty of Peace, an alien enemy partner will be entitled to recover after the war

<sup>1</sup> Lindley, 90, note (g). See the citation from Story, J.'s notes, in Lord Parker's speech in *The Anglo-Mexican* [1918] A.C. 422, 427.

<sup>2</sup> Cited by Sir Samuel Evans, P., in *The Manningtry* [1916] P. 329, 342, from the judgment of Marshall, C.J., in *The Venus* (1814) 8 Cranch, 253, 315.

<sup>3</sup> Per Lord Parker in *The Anglo-Mexican*, *supra*, 425, 426. See *The Sovfracht Case* [1943] A.C. 203, 237, per Lord Porter.

<sup>4</sup> [1919] A.C. 59, by a majority. See *Mercedes Daimler Case* (1915), 31 T.L.R. 178 ; *Rombach v. Gent* (1915), 84 L.J.K.B. 1558. *Supra*, 153-155.

<sup>5</sup> Per Lord Wright in *The Sovfracht Case* [1943] A.C. 203, 233.

See *Continho Caro v. Vermont* [1917] 2 K.B. 587, 591.

'the value of his share as it stood at the date of dissolution, together with the profits made after dissolution by the use of his capital in England: *Stevenson v. Aktiengesellschaft für Cartonnagen-Industrie*.<sup>1</sup>

An English company and a Germany company carried on business in partnership in England until 1914, when war operated as a dissolution. The English company continued business with the aid of the partnership plant. The German company were entitled, it was held, upon the resumption of peace, to a share of the profits made after dissolution by carrying on business with the aid of their capital, as well as to the value of their share of the partnership property as it existed upon the date of dissolution. The property of an enemy is not confiscated, though his right to its return is suspended during war.<sup>2</sup>

"If the English partner uses the machinery which was in part the property of the enemy partner, why should not he in justice make some allowance in respect of this use?"<sup>3</sup>

The appellants carried on the business as trustees for the partners until winding-up was effected. The enemy partner will only get "the fruits to which his property is entitled"; the working partner may claim "a large allowance for his work and skill."<sup>3</sup>

"Conversely, the British partner can recover from the enemy partner after the war (or during the war if any recognised form of effective service is possible) the latter's share of liabilities incurred before the outbreak of war and discharged by the former."<sup>4</sup>

(b) Where, upon a partner becoming an alien enemy, a partnership is dissolved, the Supreme Court of the United States has held that the enemy partner should be charged with the American's share in the German assets *at the exchange value of the mark*, not at the date of accounting, but at the date *when commercial intercourse was restored*: *Sutherland v. Mayer*.<sup>5</sup>

The rule that upon the dissolution of a partnership, the liquidating partners must settle the partnership affairs within a reasonable time and after payment of debts and liabilities, divide the proceeds among the partners according to their interests, is not different because the dissolution is the result of

<sup>1</sup> [1918] A.C. 239, 248, *per* Lord Dunedin, affirming [1917] 1 K.B. 842.

<sup>2</sup> *Per* Lord Finlay, L.C., at 245; and see *per* Lord Reading, C.J., in *Porter v. Freudenberg* [1915] 1 K.B. 857, 869, 870; *supra*, p. 95.

<sup>3</sup> *Ib.*, at 248, *per* Lord Dunedin. In *The Treasury v. Gundelfinger & Kaumheimer* [1919] T.P.D. 329 (Annual Digest, 1919-1922, Case No. 280), the Supreme Court of South Africa held that where a partnership was dissolved upon one of the partners, repatriated to Germany, becoming an alien enemy, and the remaining partners continued in possession of the partnership assets and carried on business on their own account, the Custodian of Enemy Property was entitled to claim an account as at that date, and payment of the enemy partner's share on that basis.

<sup>4</sup> *McNair*, 256. See *Trotter* 72-75.

<sup>5</sup> (1925), 271 U.S. 272.

war.<sup>1</sup> Since, however, settlement until the close of the war is normally impossible, it is "the right and duty of the enemy partners to care for and preserve the assets of the co-partnership in the possession of each for their mutual benefit when the war has ended."<sup>1</sup>

In the present case, the German partners continued to use the assets after dissolution, commingling old assets with new, and taking in a new partner. They could not bind the American partner, the court held, but he must elect either to accept what was actually done, or to enforce against the German partners a liability for what they should have done.<sup>2</sup> Having elected the latter alternative, all that he could obtain, it was argued, was what he would have obtained if the liquidation had been effected within a reasonable time and the amount of his share promptly paid to him. No loss was sustained by carrying on the business, but a great loss resulted through the depreciation of the mark. To compel the German partners to account upon the basis of the full value of the assets at the outbreak of war would be "obviously harsh and inequitable."<sup>3</sup>

As soon as the restriction upon commercial intercourse was lifted, payment became lawful, and the German partners became obliged to make it. The war between the United States and Germany was formally at an end by the Act of 2nd July, 1921; the right of commercial intercourse was restored by the War Trade Board Regulation of 14th July, 1919. The exchange value of marks was to be taken at the time when commercial intercourse first became lawful.<sup>4</sup> The American partner was entitled to interest as "an allowance in lieu of unascertainable profits."<sup>5</sup>

<sup>1</sup> (1925), 271 U.S., at 289, *per* Sutherland, J., citing *The Stevenson Case*, *supra*.

<sup>2</sup> *Ib.*, 291.

<sup>3</sup> *Ib.*, 293. See *Clay v. Field* (1891), 138 U.S. 464, 473, 474: the surviving partner of a plantation in Tennessee was not accountable for the value of slaves freed at the close of the Civil War, but was accountable for the fair rental value of the property.

<sup>4</sup> *Ib.*, 295, citing, *inter alia*, *Hicks v. Guinness* (1925), 269 U.S. 71, 80, deciding that damages are to be measured by the value of marks in dollars as at the time when the contract was broken: *per* Holmes, J. *The Volturno* [1921] 2 A.C. 544, relating to the rate of exchange for the conversion of *lire* into sterling, in respect of a claim for the detention of a ship. "After all, the court is an English court and in theory decides the right as at the time when it arises, and does so in plain English": *per* Lord Sumner, at 558. *Ferdinando v. Simon Smits & Co.* [1920] 3 K.B. 409; *Lebeaupin v. Crispin* [1920] 2 K.B. 714, 723: *per* McCardie, J.; *In re British American Continental Bank* [1922] 2 Ch. 575, where the rule was applied upon a claim in the winding-up of a company for damages for breach of contract to deliver foreign currency and the date for conversion into English currency was held to be the date of breach. See also *Madeleine Vionnet et Cie v. Wills* [1940] 1 K.B. 72, 78, *per* Clauson, L.J., and the restatement of the rule by Lord Wright in *Syndic in Bankruptcy of Salim Nasrallah Khoury v. Khayat* [1943] A.C. 507, 513.

<sup>5</sup> *Ib.*, 296.



## CHAPTER VIII

### ENEMY SHAREHOLDERS AND DIRECTORS

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#### I. ENEMY SHAREHOLDERS

##### 1. *Suspension of Membership*

(a) An enemy shareholder *under the King's protection* has the same rights and liabilities as a shareholder who is not an enemy.

(b) *The contract of membership* of an enemy shareholder who is *not under the King's protection* is not abrogated but *suspended*: upon the restoration of peace it revives.<sup>1</sup>

Between a partnership and a company the differences are fundamental. Perhaps the most important, for this purpose, are these three: *First*, a company is a legal person whose existence continues whatever happens to a particular shareholder; if a partner withdraws, the partnership is dissolved. *Secondly*, a partner normally exercises control over the business; a shareholder (except in the case of a private company) can exercise but slight control. *Thirdly*, the number of partners is limited; in a public company, the number of shareholders may be very large. For a partner to resume after the war at the point where the business was interrupted would be impossible; on the other hand, the business of a public company may be continued by its servants, and the shareholder whose rights and liabilities have been suspended may well step in again.<sup>2</sup> From

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<sup>1</sup> 1 Lindley, *Companies*, 6th ed., 53; McNair, 222-226; 2 Pitt Cobbett, 113. Chadwick's careful reasoning appears conclusive: *Foreign Investments in Time of War* (1904), 20 L.Q.R. 174-185, 180. See Phillipson, 98-105, who marshals the authorities. Baty, *contra* (1919), 33 Harv. L. Rev. 372-374.

<sup>2</sup> Chadwick (1904), 20 L.Q.R., 177, 178; Phillipson, 98-102.

these fundamental differences the irrefragable reasons given by Chancellor Kent which make the dissolution of an enemy partnership inevitable should not apply to companies.<sup>1</sup>

(c) Moreover, a shareholder possesses not merely a contract of membership, but a *right of property* which, on principle, should not be confiscated upon the outbreak of war.<sup>2</sup>

(d) *A private company*, it is true, usually contains few shareholders. Though a legal person, it may in fact be conducted as if it were a partnership or even a "one-man business."<sup>3</sup> But, as a rule, the effective control is in the hands of the directors, who usually hold all the ordinary shares. In case of hardship, the court, under the "just and equitable" clause, would, no doubt, be disposed to wind up a private company.<sup>4</sup>

### 2. *Right to Vote, suspended*

An enemy shareholder may not exercise his right to vote either in person, or by proxy: the right is suspended: *Robson v. Premier Oil & Pipe Line Co., Ltd.*<sup>5</sup>

Pickford, L.J., said that "all intercourse which could tend to such detriment (i.e., to this country), or advantage (i.e., to the enemy), whether commercial or not, is forbidden."<sup>6</sup>

### 3. *Right to receive Notice of Meetings, suspended.*

The right of enemy shareholders whose registered addresses are in enemy or enemy-occupied territories, to receive notice of the meetings of the company, is suspended: *In re Anglo-International Bank*.<sup>7</sup>

The bank had a capital of £2,000,000 divided into 2,000,000 shares of £1 each; 1,960,008 had been issued and were paid up or credited as paid up. At an extraordinary general meeting held in February, 1943, a special resolution was passed reducing the capital by £500,000 and, thereafter, by the issue of new shares, increasing the capital to its former amount. Seven shareholders were present in person, holding 17,189 shares, and 395 shareholders were present by proxy, holding together

<sup>1</sup> *Griswold v. Waddington* (1818), 16 John., at 489; see Chadwick, *op. cit.*, 176.

<sup>2</sup> *The Stevenson Case* [1918] A.C. 239, 245, *per* Lord Finlay, L.C.

<sup>3</sup> See *Salomon v. Salomon & Co., Ltd.* [1897] A.C. 22, 51, *per* Lord Macnaghten.

<sup>4</sup> Companies Act, 1929, s. 168 (6); see Buckley, *Companies Act* (1930), 11th ed., 357; Chadwick, *op. cit.*, 179.

<sup>5</sup> [1915] 2 Ch. 124, 132, *per* Sargant, J. See also the view of Lord Reading, C.J., *obiter*, in *R. v. London County Council* [1915] 2 K.B. 466, 478. McNair, 223, points out that in the *Daimler Case* [1916] 2 A.C. 307, 330, 352, Lord Shaw and Lord Parmoor "affirm with complete confidence that the rights of enemy shareholders are placed in suspense by the war."

<sup>6</sup> [1915] 2 Ch. 136.

<sup>7</sup> [1943] Ch. 233; Lord Greene, M.R., Luxmoore and Goddard, L.J.J. This decision is distinguished by Cohen, J., in *In re Warden & Hotchkiss* (1945), 61 T.L.R. 296, 298 (in Court of Appeal).

1,802,406 shares ; the special resolution was carried unanimously. Ninety-nine shareholders, holding 46,552 shares, whose registered addresses were in enemy countries or in enemy-occupied countries, viz. : Poland, Czechoslovakia, Yugoslavia, Holland, Belgium, Greece, France, Monaco and the Channel Isles, had not been served with notices of the meeting. Bennett, J., held that, since no notice had been given to the enemy shareholders, in view of the Companies Act, 1929, s. 117 (2), the special resolution had not been duly passed.

On appeal the decision was reversed.

By the above subsection, notice of the appropriate meetings must be "duly given" ; s. 115 contains provisions as to notices, *save as otherwise provided by the articles*. The articles here made other provision : by art. 140 a notice might be served either personally or by sending it through the post to a member at his registered address. No other means of service was provided. The right to receive a notice and the duty to serve it were determined by the contract as found in the articles.

Lord Greene said :—

" . . . if the right of a shareholder to receive the contractual notice is abrogated or suspended by operation of law—or, putting it another way, if the performance of the company's obligation to serve the contractual notice on him becomes illegal, the shareholder, during the period of abrogation, suspension or illegality, must be treated as having lost his contractual right to receive notice. The effect of this must be that the articles must be treated as though they had expressly denied to that shareholder the right to receive notices so that a meeting could be regularly called without him."<sup>1</sup>

Shareholders whose registered addresses were *in enemy countries* are, at common law, alien enemies.<sup>2</sup> Their right of voting is suspended ; a proxy they cannot appoint, and any proxy previously given ceases to be valid.<sup>3</sup> Even if notice had been given to them, they could not have voted.<sup>4</sup>

"The suspension of the rights of an alien enemy shareholder," Lord Greene continued,

"cannot, in our opinion, be limited to his right of voting. It must extend to the ancillary right conferred by the contract under which he holds his shares to receive notices of meetings of the company. That right is a right in relation to property in this country, namely, the shares, and is, in our opinion, suspended just as much as the right to vote."<sup>5</sup>

<sup>1</sup> [1943] Ch., at 237, 238.

<sup>2</sup> *Ib.*, at 238, citing *The Soufracht Case* [1943] A.C. 203, 209.

<sup>3</sup> *Ib.*, citing *The Soufracht Case*, per Lord Porter, at 254.

<sup>4</sup> [1943] Ch., at 239.

<sup>5</sup> *Ib.*, referring to Sargant, J., in *Robson's Case* [1915] 2 Ch. 124, 131, who speaks of "the suspension of an alien enemy . . . from the exercise of his legal and equitable rights in relation to property in this country."

Nor was the company lawfully entitled either to communicate, or to attempt to communicate, with enemy shareholders:

"In the circumstances of war as it is waged to-day, it seems to us impossible to say that any communication with an enemy alien may not tend to the detriment of this country or the advantage of the enemy, and the only safe rule to adopt is that all communications are forbidden. All communications 'across the line of war' are prohibited: *per* Lord Wright in the *Soefracht* case."<sup>1</sup>

Since their right to receive notice of meetings was suspended, the special resolution would not have been invalidated by the omission to send them notices.<sup>1</sup>

Lord Greene next examined the position of enemy shareholders in *enemy-occupied territory*.

On the evidence it was not safe to hold that all the enemy shareholders whose addresses were in enemy-occupied territory were alien enemies *at common law*.

Trading with the enemy includes having "any intercourse or dealing with" the enemy, e.g., performing "any obligation" to an enemy. To attempt to trade with the enemy is equally an offence. Since it would have been an offence to put in the post notices addressed to persons resident in those countries, this is equivalent to suspending their right to receive notices.<sup>2</sup> Nor is there any obligation upon a company to apply for a licence authorising the sending of the notices. Finally, even if a licence had been granted, the persons to whom proxies were given would themselves have had to obtain licences.<sup>3</sup>

#### 4. *Rights of the Custodian*

By the Trading with the Enemy (Custodian) Order, 1939,<sup>4</sup> there shall be paid to the Custodian any money which, but for the war, would be payable to or for the benefit of an enemy by way of—

"dividends, bonus or interest, in respect of any shares, stock, debentures, debenture stock, bonds or other securities, issued by any company or government, or any municipal or other authority."

This Article would seem to imply that the sum accrues due, but that payment is diverted to the Custodian<sup>5</sup> who, without

<sup>1</sup> *Ib.*, citing Pickford, L.J., in *Robson's Case*, *supra*, 136, and referring to [1943] A.C. 203, 217: "British subjects are prohibited from trading with him [sc. an alien enemy] and from all intercourse or communication across the line of war."

The word "other," it is submitted, in Trading with the Enemy Act, 1939, s. 1 (2) (a), is *not* to be construed *ejusdem generis*. See *supra*, 202.

<sup>2</sup> [1943] Ch., at 244.

<sup>3</sup> *Ib.*, at 244, 245.

<sup>4</sup> S.R. & O., 1939, No. 1198, art. 1 (i) (ii) (a).

<sup>5</sup> See McNair, 224, upon the similar language of the Trading with the Enemy Amendment Act, 1914, s. 2 (1).

application to the court, may exercise all the rights of a shareholder.<sup>1</sup>

Moreover, by the Trading with the Enemy Act, 1939, no securities, viz. :—

“ annuities, stock, shares, bonds, debentures or debenture stock ”<sup>2</sup>

registered or inscribed in any book kept in the United Kingdom, and allotted or transferred to, or for the benefit of, an enemy subject without the consent of the Board of Trade, will have attached to them any rights or remedies, *except with the sanction of the Board of Trade*. Again, this would suggest that the ordinary rights and remedies are simply held in abeyance.

### 5. *Company's Profit and Loss during War*

Upon the restoration of peace, and subject to the statute confirming the Treaty of Peace, an enemy shareholder will be entitled to his share of dividends distributed, and of interest accrued during the war, and he will be liable for losses incurred during the war.<sup>3</sup>

## II. ENEMY DEBENTURE-HOLDERS

Between shares and debentures there can be, for this purpose, no logical distinction.<sup>4</sup>

A debenture-holder who becomes an alien enemy remains a debenture-holder. During war his rights and liabilities are suspended. Upon the restoration of peace and subject to the statute confirming the Treaty of Peace, he will be entitled to profits earned and interest accrued. But no interest will be paid on debentures after maturity.<sup>5</sup>

## III. ENEMY DIRECTORS

### 1. *Directorship Automatically Vacated*

A director is first a shareholder, and next—in his capacity of director—an agent of the company.<sup>6</sup>

Upon the outbreak of war, a director, whether of a public or a private company, who becomes an alien enemy, automatically vacates his seat ; as the agent of the company his contract of agency is abrogated.<sup>7</sup>

<sup>1</sup> *In re Pharaon et Fils* [1916] 1 Ch. 1, 5, *per* Lord Cozens-Hardy, M.R.

<sup>2</sup> Section 5 (1), (4).

<sup>3</sup> Chadwick, *op. cit.*, 182–184 ; 2 Pitt Cobbett, 113.

<sup>4</sup> McNair, 226. Compare definition of “ securities ” in s. 5 (4).

<sup>5</sup> Chadwick, *op. cit.*, 184 ; 2 Pitt Cobbett, 113 ; Phillipson, 103–105.

<sup>6</sup> *The Daimler Case* [1916] 2 A.C. 307, 325, *per* Lord Atkinson, citing Lord Cairns in *Ferguson v. Wilson* (1866), L.R. 2 Ch. 77, 89.

<sup>7</sup> McNair, 227 ; Pitt Cobbett, 89, 113 ; Chadwick, *op. cit.*, 179, relying on *Griswold v. Waddington*, *supra* ; Phillipson, 102, 103. See also, in the *Daimler Case* [1916] 2 A.C. 307, 325, 326, 330, 352, the observations of Lords Atkinson, Shaw and Parmoor.

### 2. *As Shareholder in Public Company*

A director of a *public* company, who becomes an alien enemy, will remain a shareholder. His rights and liabilities are suspended during war; upon the restoration of peace they will revive.

### 3. *As Shareholder in Private Company*

The director of a *private* company is, in effect, a manager. Upon the principles laid down in the *Daimler Case*, the court would adopt the test of control,<sup>1</sup> and would probably regard a private company containing an enemy director as if it were a partnership. In that case, the director of a private company will cease to be a shareholder and the company would probably be wound up by the court.<sup>2</sup>

Upon the restoration of peace and subject to the statute confirming the Treaty of Peace he would be entitled to the value of his shares as they stood upon the outbreak of war.<sup>3</sup>

### 4. *Director Managing Branch in Enemy Territory*

"If a private company in this country opens a branch establishment in another country, and afterwards war breaks out between them, the director controlling the branch, being thus stamped with enemy character, would rightly drop out of the company, for the nature of his contract really constitutes him a partner with limited liability."<sup>4</sup>

#### *Note*

See *Part Cargo ex M.V. Glenroy* (1945), 61 T.L.R. 303, 305, *per Lord Porter* :

"The substance, not the form, must be observed, and inasmuch as what matters are the facts lying behind the mere formalities of the case, the German company is just as much the creature of Mitsui as if it were a branch office staffed with servants directly responsible to the Japanese company."

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<sup>1</sup> [1916] 2 A.C. 307, 344-346.

<sup>2</sup> Under s. 168 (6) of the Companies Act, 1929; Chadwick, *op. cit.*, 180, 184; Baty, *loc. cit.* Against this view it may be argued that forfeiture would imply confiscation.

<sup>3</sup> Chadwick, *loc. cit.*

<sup>4</sup> Phillipson, 102; Chadwick, *op. cit.*, 179, 184, Trotter, 83-86

## CHAPTER IX

### SALE OF GOODS

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#### A. EMERGENCY LEGISLATION

**THE** operation of contracts for the sale of goods, made or to be performed during the present war, may be affected by emergency

statutes and rules and orders made under statutory powers. It is not proposed in this work to examine in detail the nature of these restrictions; reference should be made to the text of the statutes and of the Statutory Rules and Orders.<sup>1</sup>

### I. DEFENCE REGULATION 55

A competent authority,<sup>2</sup> *so far as appears to it to be necessary* in the interests of the defence of the realm or the efficient prosecution of the war, or *for maintaining supplies and services essential to the life of the community*,<sup>3</sup> may exercise, by order, very wide powers: in effect, a general control of industry.<sup>4</sup> It may provide—

“(a) for regulating or prohibiting the production, treatment, keeping, storage, movement, transport, distribution, disposal, acquisition, use or consumption of articles of any description, and, in particular, for controlling the prices at which such articles may be sold and the charges which may be made for the hire of such articles and for labour, services or goods provided in connection with the hire;

“(b) for regulating the carrying on of any undertaking engaged in essential work, and, in particular, for controlling the charges which may be made by the undertakers in respect of the doing of any work by them;

“(c) for any incidental or supplementary matters for which the competent authority thinks it expedient for the purposes of the order to provide.”

Provision may be made for facilitating the introduction or operation of a scheme of control. The doing of anything regulated by orders may be prohibited *except under licence*.

If it appears to a competent authority that for one of the purposes already mentioned it is necessary *to take control of the whole or part of an existing undertaking* and that, to exercise such control, it is expedient that the undertaking should be carried on in pursuance of an order, the competent authority may by order authorise an “authorised controller”<sup>5</sup> to exercise such functions of control as the order specifies; his functions must be exercised in accordance with instructions and the undertaking must be carried on in accordance with the controller’s directions.<sup>6</sup>

<sup>1</sup> See Krusin & Rogers, I, 273–384; II, 357–458; III, 89–128; IV, 26–39; V, 76.

<sup>2</sup> Defined in reg. 55 (5). Its functions may be delegated.

<sup>3</sup> These purposes are not “mutually exclusive”; they “overlap at every point, and many matters will fall under two or more of them, or under all four”: per Lord Greene, M.R., in *The Carltons Case* (1943), 2 All E.R. 560, 561.

<sup>4</sup> Regulation 55 (1), as amended.

<sup>5</sup> See *John Fowler & Company (Leeds), Ltd. v. Duncan* [1941] Ch. 450.

<sup>6</sup> Reg. 55, para. (4).



The powers conferred by the regulation may be exercised over any undertaking whether or not it has been declared under reg. 54C "a controlled undertaking."<sup>1</sup>

Under this regulation a vast number of orders have been made fixing prices and restricting the sale and purchase of commodities.<sup>2</sup> The distribution of food is now governed by *The Food Rationing (General Provisions) Order, 1944*.<sup>3</sup> Manufacturers of "controlled goods" and wholesale dealers in such goods must be registered with the Board of Trade and are subject to *Limitation of Supplies Orders*<sup>4</sup>; except under licence no registered person must supply controlled goods exceeding in value his "quota," i.e., the "appropriate proportion" of the value of the total quantity of controlled goods of that class supplied by him during the "standard period." The supply of rationed goods is regulated by *The Consumer Rationing Orders*<sup>5</sup>; except under licence no trader may supply to a retail customer or to another trader rationed goods otherwise than against the surrender of the appropriate number of coupons and in accordance with the order.

In *Muir v. Veitch, Moir, Ltd.*,<sup>6</sup> it was held that an order which not merely fixed minimum and maximum prices, but also provided that the price should be taken as at the date of delivery, was not *ultra vires*. Thus, where the agreed price was the minimum price fixed by the relevant order, but, at the date of delivery, was less than the minimum fixed by a later order, a breach of the order had been committed.

The words "sell" and "sale" in orders made under this regulation have the same meaning as they bear under the Sale of Goods Act. Thus, where there is an agreement to sell goods within the controlled price, the transaction does not become a sale until the date when the property passes. If, on that date, the agreed price exceeds the controlled price, an offence under the relevant order has been committed: *Mischeff v. Springett*.<sup>7</sup>

## II. TRADING WITH THE ENEMY ACT, 1939

The effect upon contracts of the prohibition against trading with the enemy has already been examined.<sup>8</sup>

<sup>1</sup> Regulation 55, para. (5A).

<sup>2</sup> *Krusan & Rogers*, II, 752 *et seq.*; V, 202-203. See *The Sales by Auction and Tender (Control) Order, 1944* (S.R. & O., 1944, No. 767), and *The General Furniture (Control) Order, 1944* (S.R. & O., 1944, No. 768).

<sup>3</sup> S.R. & O., 1944, No. 843.

<sup>4</sup> *Ib.*, II, 803-823; III, 261-263; IV, 128-139; V, 231-244. See *Limitation of Supplies (Miscellaneous) (No. 23) Order, 1944* (S.R. & O., 1944, No. 835).

<sup>5</sup> *Consumer Rationing (Consolidation) Order, 1944* (S.R. & O., 1944, No. 800).

<sup>6</sup> [1942] S.C. (J.) 81, 85-86, *per* Lord Justice-General (Normand).

<sup>7</sup> [1942] 2 K.B. 331, 336, *per* Tucker, J.

<sup>8</sup> *Supra*, 202 *et seq.*

### III. IMPORT, EXPORT AND CUSTOMS POWERS (DEFENCE) ACT, 1939

The export and import of goods, and their carriage coastwise, or shipment as ships' stores, may be controlled by orders made by the Board of Trade,<sup>1</sup> which may suspend the operation of any enactment or order.<sup>2</sup>

Goods exported or imported or dealt with in contravention of an order made under this Act or of the law relating to trading with the enemy, will be forfeited.<sup>3</sup>

Certain orders prohibit the export or import of certain goods save with licence from the Board of Trade.<sup>4</sup>

### IV. PRICES OF GOODS ACT, 1939

#### 1. "Price-Regulated Goods"

The Prices of Goods Act, 1939,<sup>5</sup>—now to be read together with the Goods and Services (Price Control) Act, 1941, and called "the principal Act"<sup>6</sup>—*prohibits*, during the emergency,<sup>7</sup> the sale,<sup>8</sup> or agreement, or offer to sell<sup>9</sup> in the course of any business, of "price-regulated" goods at more than the "*permitted price*"<sup>10</sup>; i.e., the "*basic price*" together with the "*permitted increase*."<sup>11</sup>

Orders fixing the "*permitted price*" continue in force and have effect as if they were orders fixing a maximum price under the Act of 1941.<sup>12</sup>

"Offer" includes a notification—

(a) of the price proposed for a sale of goods, by the publication of a *price list*, by exposing for sale with a *mark indicating price*, by *furnishing a quotation*, or in *any other way*;

(b) of the price proposed for goods *which a person has sold or agreed to sell* in such circumstances that *the buyer is liable for a reasonable price*, whether by furnishing an account or in any other way.<sup>13</sup>

<sup>1</sup> Section 1 (1).

<sup>5</sup> *Ib.*, s. 1 (3).

<sup>3</sup> *Ib.*, s. 3 (1).

<sup>4</sup> See p. 244, note 4.

<sup>5</sup> For the Act, commentary and orders, see Krusin & Rogers, 334-354; II, 445-453; III, 106-113; IV, 35, 36; V, 79-89.

<sup>6</sup> Sections 20 (1) and 23 (1).

<sup>7</sup> Section 23 (2).

<sup>8</sup> See *Robinson v. Graves* [1935] 1 K.B. 579 for the difference between a contract for the sale of goods and a contract for work and labour.

A hire-purchase agreement is neither a sale, nor an agreement for sale: *Helby v. Matthews* [1895] A.C. 471; *semble*, an offer to sell: *thus*, Krusin & Rogers, 335.

A sale carried out by an employee in the course of his employment is prohibited: *Duguid v. Fraser* [1942] S.C. (J.) 1. Ignorance of the proper price is no defence *R. v. Jacobs* [1944] 1 K.B. 417, 420.

<sup>9</sup> For the Permitted Prices Orders, see Krusin & Rogers, II, 450, 451.

<sup>10</sup> Section 1.

<sup>11</sup> Section 1 (9) of the Act of 1941.

<sup>12</sup> Section 20 (4) of the Act of 1941.

The Act is enforced through the medium of a *Central Price Regulation Committee* and *Local Price Regulation Committees*.<sup>1</sup>

#### 4. *Buyer's Rights upon Seller's Conviction*

Where the seller of goods has been convicted of selling price-regulated goods at an excessive price, the buyer (provided that he did not aid, abet, counsel or procure the contravention) has the option of exercising certain rights.<sup>2</sup> The same rights may be exercised (whether the offence was a sale, an agreement to sell, or an offer to sell) by the buyer of similar goods sold in the course of that business at the same or a higher price, before the date of the conviction.<sup>3</sup>

(i) He may avoid the sale or agreement and recover the amount paid as consideration, as money received for his use. But this right cannot be exercised—

(a) if rights acquired by a *third party* would be prejudiced ;

(b) if an *unreasonable time* has elapsed ; or

(c) unless (in case of a sale) the buyer tenders the goods to the seller in substantially the same state as they were when the property passed.<sup>4</sup>

(ii) He may affirm the sale or agreement and recover any loss, taking into account any consideration received, or to be received, on a resale or on an agreement to resell.<sup>5</sup>

Interest at the rate of 5 per cent. will be recoverable from the date when the sum was paid.<sup>6</sup>

#### 5. *Buyer's Rights where no Conviction*

Where there has been no prosecution or conviction, the rights of the parties would appear to be as follows :—

(a) If no property has passed, a person who has agreed to buy can normally recover any money that he has paid : *Taylor v. Bowers*<sup>7</sup> :

“ If money is paid or goods delivered for an illegal purpose, the person who had so paid the money or delivered the goods may recover them back before the illegal purpose is carried out.”<sup>8</sup>

(b) If the seller sues for the price, the buyer is entitled to plead that the contract is illegal and void. If the buyer has

<sup>1</sup> Section 8 (of which subs. (3) and (7) are repealed) and s. 11 of the 1941 Act, *infra*. See Price Regulation Committees Regulations, 1941 (S.R. & O., 1941, No. 1978 ; No. 800 of 1943) : Krusin & Rogers, III, 112, 113 ; V, 89.

<sup>2</sup> Prices of Goods Act, 1939, s. 10 (1) (a) ; s. 10 (5).

<sup>3</sup> *Ib.*, s. 10 (1) (b).

<sup>4</sup> *Ib.*, s. 10 (2).

<sup>5</sup> *Ib.*, s. 10 (3).

<sup>6</sup> Section 10 (4). See *The First Schedule* of the Act of 1941 for the application of s. 10 to ss. 1, 2 and 6 of that Act.

<sup>7</sup> (1876), 1 Q.B.D. 291 ; see Anson, *op. cit.*, 253 ; Salmond and Winfield, *Contracts*, 153 ; and see the notes in Krusin & Rogers, 346, 347. But *quære* whether this rule applies where the agreement to sell is made by statute equally illegal.

<sup>8</sup> (1876), 1 Q.B.D. 300, *per* Mellish, L.J.

paid the price and the seller refuses to deliver, the seller, in defence to an action, is also entitled to plead the illegality of the contract.<sup>1</sup> The court, of its own instance, must take notice of the illegality.<sup>2</sup>

## 6. Innocent Third Parties

*Rights acquired by "innocent third parties"* will not be prejudiced by any transaction which is illegal under this Act. "Innocent third parties" are all persons other than a person who, in that transaction, has contravened the Act, or who has aided, abetted, counselled or procured that contravention.<sup>3</sup>

## V. GOODS AND SERVICES (PRICE CONTROL) ACT, 1941

The function of the Goods and Services (Price Control) Act, 1941, was to tighten the law in order "to prevent excessive charges for goods and for services in relation to goods (including hiring and subjecting to a process)."<sup>4</sup>

### 1. Power to Fix Maximum Prices

The Board of Trade has power, by order, to fix the *maximum price* to be charged in the course of specified classes of business<sup>5</sup> for specified kinds of goods; to sell, or to agree or offer<sup>6</sup> to sell such goods in the course of such business at a higher price, is unlawful.<sup>7</sup> Orders made under the Act of 1939 specifying a "permitted price" continue to have effect as if the price were a "maximum price."

The Board of Trade is also empowered, by order, to fix the *maximum charge* to be made in the course of specified classes of business for performing in relation to specified kinds of goods,

<sup>1</sup> Salmond & Winfield, 150. This is within the principle recently laid down by the Court of Appeal in *Bowmakers, Ltd. v. Barnet Instruments, Ltd.* [1945] 1 K.B. 65, 71, *per du Parcq, L.J.*: "... a man's right to possess his own chattels will as a general rule be enforced against anyone who, without any claim of right is detaining them, or has converted them to his own use, even though it may appear, either from the pleadings or in the course of the trial, that the chattels in question came into the defendant's possession by reason of an illegal contract between himself and the plaintiff, provided that the plaintiff does not seek, and is not forced, either to found his claim on the illegal contract or to plead its illegality in order to support his claim."

<sup>2</sup> *Alexander v. Rayson* [1936] 1 K.B. 169; *In re Mahmoud and Ispahani* [1921] 2 K.B. 716, 729, *per Scrutton, L.J.*, *infra*, 258-260.

<sup>3</sup> Section 15.

<sup>4</sup> For text and commentary, see Krusin & Rogers, II, 421-444.

<sup>5</sup> "Business," *prima facie* includes branch of a business: s. 20 (1).

<sup>6</sup> See s. 20 (4).

<sup>7</sup> Section 1 (1). Krusin & Rogers, V, 78. See Utility Furniture (Maximum Prices and Charges) Order, 1944 (S.R. & O., 1944, No. 766); General Furniture (Maximum Prices and Charges) Order, 1944 (S.R. & O., 1944, No. 765); Utility Apparel (Maximum Prices and Charges) Order (S.R. & O., 1945, No. 184).

*specified kinds of services*<sup>1</sup>; to perform, or to agree or offer<sup>2</sup> to perform in the course of such business any such service at a higher charge, is unlawful.<sup>3</sup>

A person carrying on a business includes a manager.<sup>4</sup>

Section 10 of the principal Act is applied in *The First Schedule* of this Act to cases where a prosecution has been instituted and a conviction obtained for a sale above the maximum price or for a charge above the maximum charge for price-controlled services.<sup>5</sup>

## 2. *Second-hand Goods*

If the Board of Trade is satisfied that excessive prices are being charged for any kind of second-hand goods either in the United Kingdom generally, or in a particular part, the Board may, by order, provide for *prohibiting the sale* of that kind of second-hand goods in the course of a business *unless the person carrying on that business is registered*. The Board will be empowered (subject to appeal to a referee) to refuse to register, or to cancel the registration of, persons who appear to have charged excessive prices for second-hand goods to which the order applies or to have been party to any practice appearing to the Board to have been calculated to raise the prices unduly.<sup>6</sup>

## 3. *Middlemen and Brokers*

The Board of Trade may, by order, provide as regards goods of any kind to which the order applies, for *prohibiting, except under licence* and subject to conditions specified in the licence,

(a) *the resale, otherwise than by retail*, in the course of any business which includes the sale of that kind of goods, *of any goods of that kind which have been bought* in the course of that business, *except goods imported or bought from the manufacturer or importer*, in the course of that business; and

(b) *the resale*, in the course of any such business, of any goods of that kind which have been *bought by retail* in the course of that business.<sup>7</sup>

## 4. *Composite Offer*

Where *the offerer* offers, in the course of any business, to enter into a transaction for an *entire consideration* in respect of the sale of price-controlled goods or the performance of a price-controlled

<sup>1</sup> See definition in s. 20 (1). Performance of service in relation to goods includes the *hiring* of goods and the subjecting of goods to any process: see s. 20 (2).

<sup>2</sup> See s. 20 (4). "Offer" includes a reference to a *notification* of the consideration proposed, whether made before or after the performance of the service.

<sup>3</sup> Section 2 (1). For list of orders, see Krusin & Rogers, III, 106 *et seq.*

<sup>4</sup> Section 20 (5).

<sup>5</sup> See *Note*, Krusin & Rogers, II, 443, 444.

<sup>6</sup> Section 3 (1) and (2) (a); Krusin & Rogers, V, 79-86.

<sup>7</sup> Section 4 (1). And see Krusin & Rogers, IV, 35.

service, and in respect of some other matter, *the offeree may require*, the offeror to state in writing—

(a) *what part of the consideration* the offeror assigns to the price-controlled goods or services ;

(b) if two or more sets of price-controlled goods or services are involved, *the several parts of the consideration* which the offeror assigns to those matters.<sup>1</sup>

The Board of Trade or a price-regulation committee may *within twenty-one days after the offer was made*, require the offeror to make to the Board or committee such a statement.<sup>2</sup>

Where in pursuance of such a requirement, the offeror makes such a statement, he will be deemed to have offered to sell the goods and to perform the service, for that consideration.<sup>3</sup>

### 5. *Holding up Stocks*

If a person (a) *carrying on a business* in the course of which any kind of price-controlled goods are normally sold, *has in his possession* in the course of that business, *a stock of goods of that kind* and, (b) if he, or his employee, *when asked* by a buyer to sell that kind of goods or whether he or his employee has such goods for sale—

(i) *refuses to sell, or denies* that he has the goods, or *leads the buyer to suppose* that he has not got the goods or will not, or cannot, sell them ; or

(ii) offers to sell *subject to a condition* requiring the buying of any other goods or the making of any payment for service or *subject to any other condition* except prompt payment or taking delivery within a reasonable time,

the person carrying on the business will be guilty of an offence.<sup>4</sup>

It will be a defence, however, to prove that the sale, or the sale without the proposed conditions, would, *having regard to the quantity requested or to any other consideration*—

(a) be contrary to the *normal practice of his business* ; or

(b) involve a *breach of obligation lawfully binding* ; or

(c) interfere with arrangements for an *orderly disposal of stocks among his regular customers*.<sup>5</sup>

By *The Price Control (Regulation of Disposal of Stocks) Act, 1943*, however, if it appears to the Board of Trade to be *expedient*, in the interests of war purposes, that the *disposal of such stocks* should be *restricted* or effected *subject to conditions*, they may issue licences permitting such persons to *restrict sales* from such stocks to *particular classes of buyers* or to *impose conditions*.<sup>6</sup>

<sup>1</sup> Section 8 (1) (a) and (b), replacing s. 11 of the principal Act.

<sup>2</sup> Section 8 (2).

<sup>3</sup> Section 8 (3).

<sup>4</sup> Section 9 (1) (a) and (b), replacing s. 12 (1) and (2) of the principal Act.

<sup>5</sup> Section 9 (2), replacing s. 12 (3) of the principal Act.

<sup>6</sup> Section 1 (1) (2). See Consolidated General Licence, S.R. & O., 1945, No. 282.

### 6. *Barter, Mortgages and Pledges*

A person in the course of his business must not *transfer*, or agree or offer to transfer, *the property in any price-controlled goods* (with or without further consideration) for a consideration consisting of or including the transfer of, the property in other goods.<sup>1</sup>

"Transferring property" includes transferring *an interest in goods*, the property in, or possession of which is for the time being transferred to another person as security for a debt.<sup>2</sup>

Where, in the course of a business, a person *transfers*, or agrees or offers to transfer, *for a money consideration his interest in price-controlled goods* the property in or possession of which he has for the time being transferred to another person as security for a debt, *he will be deemed to have sold*, or agreed or offered to sell, those goods *for a price equal to the sum of the following* :—

- (a) The amount of the money consideration.
- (b) The debt and interest.
- (c) Charges payable to the third person in respect of the goods.<sup>3</sup>

### 7. *Price Regulation Committees*

The Act is enforced through Price Regulation Committees<sup>4</sup> which must keep under review the *prices of goods* in their locality and the *charges for services* in relation to goods.<sup>5</sup> They should make a representation to the Central Price Regulation Committee if it appears expedient—

(i) that an order should be made by the Board of Trade defining certain goods as "*price-regulated*" goods or that a *maximum price* should be fixed, or that the *sale of certain second-hand goods* should be regulated ; or

(ii) that a *maximum charge* should be fixed for services in relation to goods.<sup>6</sup>

### 8. *Furnishing of Invoices*

The Board of Trade may, by order, make provision for requiring that where price-controlled goods are *sold in the course of a business and bought in the course of another business*, the seller *shall furnish an invoice* to the buyer.<sup>7</sup> Such order may provide—

- (a) for its application to all price-controlled goods or to price-controlled goods of prescribed descriptions ;
- (b) for requiring the invoice to contain *prescribed particulars* ;
- (c) for requiring the buyer—

<sup>1</sup> Section 10 (1) of the 1941 Act.

<sup>2</sup> Section 10 (2).

<sup>3</sup> Section 10 (4).

<sup>4</sup> Section 11, applying s. 8 (2), (4), (5) and (6) of the principal Act to the enforcement of this Act.

<sup>5</sup> Section 11 (2) (a) and (b).

<sup>6</sup> Section 11 (2) (i) and (ii).

<sup>7</sup> Section 13 (1).

- (i) upon non-receipt of such invoice, *to demand* such invoice and inform the seller that he is buying in the course of a business to which the order applies ;
- (ii) *to give notice* to the prescribed person of any default by the seller ;
- (iii) *to preserve the invoice* for the prescribed period.<sup>1</sup>

Under this section the Price-Controlled Goods (Invoices) Order, 1943, was made.<sup>2</sup> An invoice must be furnished within seven days of delivery and must contain the particulars prescribed. If the buyer does not receive an invoice or an adequate invoice, he must within fourteen days *demand* one in writing and *inform* the Local Price Regulation Committee in writing that the seller has *failed to furnish* him with an invoice. The buyer must *preserve* the invoice for twelve months and the seller must *keep a copy* for twelve months.

## B. EFFECT OF REQUISITION

### 1. Power to Requisition

A "competent authority,"<sup>3</sup> if it appears "necessary or expedient" *either* in the interests of the public safety, *or* the defence of the realm, *or* the efficient prosecution of war, *or* for maintaining supplies and services essential to the life of the community,<sup>4</sup> may requisition<sup>5</sup>—

(a) any *chattel* in the United Kingdom (including any vessel or aircraft and anything on board a vessel or aircraft *including any detachable part of any vehicle*)<sup>6</sup> ; and

<sup>1</sup> Section 13 (2) (a), (b), (c).

<sup>2</sup> S.R. & O., 1943, No. 604 ; Krusin & Rogers, V, 86, 87.

<sup>3</sup> Defined in reg. 49 (1), as amended by S.R. & O., 1939, Nos. 1185 and 1500 ; 1940, No. 763 ; 1942, Nos. 1131, 1181.

<sup>4</sup> See *per* Lord Greene, M.R., in *The Carltona Case* (1943), 2 All E.R. 560, 563.

<sup>5</sup> For meaning of "requisition," see Compensation (Defence) Act, 1939, s. 17 (1) : "take possession of the property or require the property to be placed at the disposal of the requisitioning authority." And see the judgment of Wright, J., in *France Fenwick & Co. v. R.* [1927] 1 K.B. 458, 464, 465 : "'Requisition' . . . means, in my judgment, some effective and positive dominion or control constituted by a definite order given under the regulations" [*sc.* the Emergency Regulations, 1921 . . .] In *James Macara, Ltd. v. Barclay* [1945] 1 K.B. 148, 154 (concerning the taking possession of land under reg. 51), the Court of Appeal, *per* Uthwatt, J., thought that "actual entry" was not necessary, but was merely one method of taking possession : "the power is effectively exercised by notice which fairly brings to the mind of the person affected that the power is being exercised." In *Owari Kaval, Ltd. v. Grigg* [1945] 1 K.B. 157, Atkinson, J., held that land may be requisitioned even though the owner is willing to give possession by agreement. Affirmed (1945), 61 T.L.R. 298. The reasoning of those two decisions applies equally, it is submitted, to requisition of *chattels*.

<sup>6</sup> S.R. & O., 1942, No. 2094.



(b) any *British ship*<sup>1</sup> or *aircraft* or anything on board a British ship or aircraft, *wherever the ship or aircraft may be.*<sup>2</sup> The *prerogative* powers of the Crown are preserved.

The authority may give such directions as appear to it to be necessary or expedient in connection with the requisition.

## 2. Powers over Goods Requisitioned

(a) Where a competent authority requisitions property under reg. 53, or any property (other than land)<sup>3</sup> is in the possession or at the disposal of an authority under the prerogative, or under s. 52 of the Telegraph Act, 1863, or under s. 7 of the Air Navigation Act, 1920 (as amended), the authority may *use or deal with, or authorise the use or dealing with the property for such purpose and in such manner as the authority thinks expedient for one of the above-mentioned war purposes, and may hold, or sell or otherwise dispose of the property as if the authority were the owner and as if the property were free from any mortgage, pledge, lien or other similar obligation.*<sup>4</sup>

(b) Where the property requisitioned is a *vessel, vehicle, aircraft, excavator, crane, agricultural implement, or agriculture mining or quarrying machinery*, the authority may acquire it, by serving on the owner a *Notice of Acquisition* stating that the authority has acquired it under reg. 53.

Where a Notice of Acquisition is thus served on the owner, at the beginning of the day on which it is served the chattel *vests in the authority free from any mortgage, pledge, lien or other similar obligation, and the period of requisition ends.*<sup>5</sup>

<sup>1</sup> See *Nicholaou v. Minister of War Transport* (1944), 2 All E.R. 322, where, on a case stated by the Shipping Claims Tribunal, Tucker, J., held that the mere order to discharge requisitioned cargo does not involve requisition of the ship.

<sup>2</sup> Regulation 53 (1). It would appear that the last words in (b) were inserted to overcome the decision of Bailhache, J., in *Russian Bank for Foreign Trade v. Ercoss Insurance Co., Ltd.* [1918] 2 K.B. 123, 130, where the requisition of a British steamship, while at Novorossisk for the use of the Russian Government was held *ultra vires*. The proclamation had only authorised the requisition of ships *within the British Isles or adjacent waters*. Nor was the requisition within the prerogative. (His decision was affirmed on a different ground, the Court of Appeal not deciding the other points: [1919] 1 K.B. 39.) But see Holdsworth, *The Power of the Crown to Requisition British Ships in a National Emergency* (1919), 35 L.Q.R. 12-42, for the view that the Crown, by the prerogative, may requisition British ships *wherever they are*.

<sup>3</sup> "Land" includes growing timber which has not been severed, although as between vendor and purchaser, under the contract of purchase, it may have become "goods." Both the Defence Regulations and the Compensation (Defence) Act, 1939, s. 17 (1), distinguish between "land," and "chattels" or "property other than land." For decision of General Claims Tribunal, see Strathon, *Compensation (Defence)*, 21, 22.

<sup>4</sup> Regulation 53 (2), as amended by S.R. & O., 1939, Nos. 1284, 1463, 1682; 1941, No. 1941; 1942, No. 1279. Compare Compensation (Defence) Act, 1939, s. 4 (8) (9) upon the acquisition of requisitioned vessels, vehicles or aircraft.

<sup>5</sup> Emergency Powers (Defence) Act, 1939, s. 9. Contrast *De Keyser's Hotel Case* [1920] A.C. 508, 526, *per Lord Dunedin*.

### 3. *Trading Ships of Foreign State*

It is submitted that reg. 53 (1) (a), does not include a power to requisition *the trading ships of a foreign sovereign State*.

In *The Cristina*,<sup>1</sup> a Spanish ship, registered at Bilbao, was lying at Cardiff. Before her arrival, but after she had left Spain, the Spanish Government requisitioned ships registered at Bilbao and, acting on instructions, the Spanish consul at Cardiff went on board the ship, dismissed the master and put a new master in charge. The owners issued a writ *in rem* claiming possession of *The Cristina* and the Spanish Government moved to set aside the writ since it impleaded a foreign sovereign State. The writ was ordered to be set aside on the ground that the court will not allow the arrest of a ship, including a trading ship, in the possession of a foreign sovereign State and which has been requisitioned by it for public purposes.

Lord Atkin referred to two *propositions of international law engrafted into English domestic law*. The first is that *English courts will not implead a foreign sovereign* :

"The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control."<sup>2</sup>

The principle extends to property used for the commercial purposes of the sovereign.

Lord Thankerton, on the other hand, thought that an action *in rem* might be brought against the property of a sovereign engaged in private trading.<sup>3</sup> Lord Macmillan hesitated to lay down that "an ordinary foreign trading vessel is immune from civil process within this realm by reason merely of the fact that it is owned by a foreign State, for such a principle must be an importation from international law and there is no proved consensus of international opinion or practice to this effect."<sup>4</sup> Lord Maugham expressed the opinion, held "with practical unanimity" by foreign jurists, by English lawyers and by business men,

"that, if Governments or corporations formed by them choose to navigate and trade as shipowners, they ought to submit to the same legal remedies and actions as any other shipowner."<sup>5</sup>

Lord Wright, after reviewing the authorities, and citing the

<sup>1</sup> *Compania Naviera Vascongada v. S.S. Cristina* [1938] A.C. 485.

See (1938), 19 B.Y.I.L., 243-249; Note, F.A. Mann, (1938) 2 Mod. L. Rev. 57-62.

<sup>2</sup> *Ib.*, at 490. He referred in argument (at 487) to Dicey *Conflict of Laws*, 5th ed., 194: "No action or other proceeding can be taken in the courts of this country against a foreign sovereign, nor can the property of a foreign sovereign be seized or arrested, even if it be merely a ship engaged in commerce."

<sup>3</sup> *Ib.*, at 495, 496.

<sup>4</sup> *Ib.*, at 498.

<sup>5</sup> *Ib.*, at 522.

proposition laid down by Brett, L.J., in *Parlement Belge*,<sup>1</sup> referred, with approval, as correctly stating the English law, to the decision of the Court of Appeal in *The Porto Alexandre*<sup>2</sup> and to the decision of the Supreme Court of the United States in *Berizzi Brothers Co. v. S.S. Pesaro*.<sup>3</sup> Van Devanter, J., said :—

“We think the principles are applicable alike to all ships held and used by a government for a public purpose, and that when, for the purpose of advancing the trade of its people or providing revenue for its treasury, a government acquires mans and operates ships in the carrying trade, they are public ships in the same sense that war ships are. We know of no international usage which regards the maintenance and advancement of the economic welfare of a people in time of peace as any less a public purpose than the maintenance and training of a naval force.”

Is the position altered by reg. 53 (1) (a) ? It is submitted that, although the words are very wide, a specific provision would be necessary to entitle a competent authority to requisition a trading vessel belonging to a foreign sovereign State.<sup>4</sup>

#### 4. *Right of Angary, distinguished*

Compare and contrast *the right of angary*, “a right to requisition certain kinds of property belonging to *neutrals* found within the territory of a belligerent . . .”

“It extends to neutral ships and their cargoes, aircraft and all means of transport, arms, ammunition and other property useful to war which is urgently required by a State in time of war or public danger and which is lying within the territory of the State or in territory occupied by its forces at the time of requisition. The right does not attach to the personal services of the crews of foreigners, and reasonable provision must be made for the contingency, payment in full by way of compensation must be made to the owners of the vessels and goods requisitioned.”<sup>5</sup>

<sup>1</sup>(1880), 5 P.D. 197, 214.

<sup>2</sup>[1920] P. 30. See at 38, *per* Scrutton, L.J., and *per* Warrington, L.J., at 35. See Lauterpacht, *Note* (1938). 54 L.Q.R. 339-344. And see Oppenheim, *International Law* (1937), 5th ed., vol. I, 669.

<sup>3</sup>[1938] A.C., at 511, citing (1925), 271 U.S. 562, 574. In that case a passage was cited from the opinion of Gray, J., in *Briggs v. Light Boats* 11 Allen 157, 163, 165 (1865), 93 Mass. 157: “The immunity from such interference arises, not because they are instruments of war but because they are instruments of sovereignty.” This judgment was referred to with approval by Brett, L.J., in *The Parlement Belge* (1880), 5 P.D. 213, 217, and by Warrington, L.J., *supra*.

<sup>4</sup>See in another context, *per* Viscount Birkenhead, L.C., in *Viscountess Rhondda's Claim* [1922] 2 A.C. 339, 348-380, and at 365.

<sup>5</sup>See Higgins & Colombos, *The International Law of the Sea*, 389, 390, 389-396, and the illuminating monographs of Bullock, on *Angary*, in *B.Y.I.L.*, 1922-23, 99-129, and definition at 129, and of Harley, in *A.J.I.L.*, vol. 13 (1919), 367-301.

*Requisition* is distinct from *angary* which is a right recognised by the laws of war.<sup>1</sup> *Angary* involves a right to *full* compensation<sup>2</sup>; compensation for requisitioned property is a statutory measure, less than the market value.<sup>3</sup>

### 5. Effect of Requisition

The requisition by a competent authority of *specific* goods, agreed to be sold but not yet delivered, excuses the seller from performance of the contract.<sup>4</sup>

The owners of a parcel of wheat in a Liverpool warehouse sold it, "cash within seven days against transfer order." Before delivery and before the property passed, the wheat was requisitioned. The buyers claimed damages. Since, by the contract, the sellers retained the right of disposal of the goods until payment, the property had not passed and the sellers were excused from performance.

"The contract," said Lord Reading, C.J., "must be taken as an undertaking by the sellers to deliver the goods subject always to this condition, that if the Government requisition the goods and render it impossible by their act for the sellers to perform their contract they should be excused from performance."<sup>5</sup>

By reason of "the lawful act of the executive, the thing, in a sense, has perished."<sup>6</sup> The contract was not absolute: if,

<sup>1</sup> *Op. cit.*, 390. See *The Zamra* [1916] 2 A.C. 77, 101 *et seq.*, 106, *per* Lord Parker. The right is a prerogative right: *per* Atkin, L.J., in *Commercial and Estates Company of Egypt v. Board of Trade* [1925] 1 K.B. 271, 293, 294.

<sup>2</sup> *Commercial & Estates Company of Egypt v. Board of Trade* [1925] 1 K.B. 271, 295, *per* Atkin, L.J.; *Netherlands American Steam Navigation Company v. H.M. Procurator-General* [1926] 1 K.B. 84, 95, *per* Bankes, L.J.

<sup>3</sup> Compensation (Defence) Act, 1939, s. 4 (vehicles, vessels and aircraft); s. 6 (other goods). See Krusin & Rogers' commentary, 700-753.

During the War of 1914, *The Defence of the Realm Losses Commission* recommended *ex gratia* payments of compensation. Under the Indemnity Act, 1920, s. 2 (1) and (2), a person who incurred or sustained "any direct loss or damage" by interference with his property or business in the United Kingdom through a requisition, under the prerogative or otherwise, became entitled to payment or compensation upon the principles specified in subs. (2) (iii) (a) and (b) and in Pt. II of the Schedule to the Act. The tribunal was *The Commission*, thereafter known as *The War Compensation Court*. For the meaning of "direct loss or damage," see *A. & B. Taxis, Ltd. v. Secretary of State for Air* [1922] 2 K.B. 329, *per* Bankes, L.J., at 335-337, and *per* Atkin, L.J., at 343.

See also Scott and Hildesley, *Case of Requisition, 1920, Excursus I, Notes on The Right to Compensation in Respect of Requisitioned Property Other than Land*, 136-157.

<sup>4</sup> *In re an Arbitration between Shipton, Anderson & Co. and Harrison & Co.* [1915] 3 K.B. 676.

<sup>5</sup> *Ib.*, at 681.

<sup>6</sup> *Ib.*, at 682, adopting the reasoning in *Nickoll & Knight v. Ashton, Edridge & Co.* [1901] 2 K.B. 126, 132, *per* A. L. Smith, M.R.

before breach, performance became impossible by reason of the specified thing ceasing to exist without the defendant's default, the parties were excused. Thus, an impossibility, arising from the act of the Legislature discharges the contractor.<sup>1</sup> Here, the act was "a lawful act of State which equally rendered the delivery of these *specific* goods impossible."<sup>2</sup>

#### 6. Effect of Unlawful Requisition

The unlawful requisition of specific goods, it is submitted, will not excuse the seller from performance.

Upon this point there is no decided case ; but in a claim upon a marine insurance policy, in a case where the ship had been unlawfully requisitioned under an *ultra vires* order, Bailhache, J., said :—

"Obedience to such an order, however praiseworthy in a loyal citizen, is, in my opinion, a voluntary act on his part and not a restraint of princes. It is quite otherwise if the order is accompanied by threats of force, or followed by the use of force. In such a case, disobedience not being illegal, the use of force to compel obedience is illegal . . ."<sup>3</sup>

It follows that—

"as disobedience to an *ultra vires* order is not illegal, obedience to such an order, unless compelled by force, or threats of force, is a voluntary act and not a restraint of princes."

In the Court of Appeal, upon the question whether an *ultra vires* requisition by the Admiralty might fall within the words "restraint of princes," Scrutton, L.J., "without expressing a final opinion, inclined to the view that it well might."<sup>4</sup>

### C. REQUIREMENT OF LICENCE

#### 1. Illegal without Licence

A contract for the sale of goods which is *prohibited except under licence* becomes *illegal* to perform unless such licence is obtained and no claim can be made under the contract : *In re an Arbitration between Mahmoud and Ispahani*.<sup>5</sup>

In August, 1919, M sold to I 150 tons of linseed oil, delivery 50 tons during October, November and December, 1919. When the contract was made, the Seeds, Oils and Fats Order, 1919,

<sup>1</sup> *Per* Hannen, J., in *Barly v. De Crespigny* (1869), L.R. 4 Q.B. 180, 186.

<sup>2</sup> [1915] 3 K.B., at 683.

<sup>3</sup> *Russian Bank for Foreign Trade v. Excess Insurance Co., Ltd.* [1918] 2 K.B. 123, 180, 131.

<sup>4</sup> [1919] 1 K.B. 39, 40.

<sup>5</sup> [1921] 2 K.B. 716. See also *J. W. Taylor & Co. v. Landauer & Co.* (1940), 4 All E.R. 335. See Glanville L. Williams, *The Legal Effect of Illegal Contracts* (1942), 8 Camb. Law Journ., 51-69, at 58-69.

was in force, which provided that no person should *buy or sell or deal in* specified articles (including linseed oil) *except under and in accordance with a licence* issued by or under the authority of the Food Controller. *All parties to the purchase or sale* of specified articles were to *require or disclose* the necessary or required information in order to satisfy the other party or the Controller that the order had not been contravened.

In October, M tendered delivery of the first instalment due; I, denying a binding contract, declined to accept. M thereupon gave notice of intention to sell, sold at the best price, and claimed the difference. I then contended that, since no licence had been issued to him, the contract was illegal. M tendered deliveries of the November and December instalments; I refused to accept. M sold against him and lost £2,295.

The umpire found that M had obtained a licence which entitled him to sell only to persons holding a licence to buy, and that, before the contract was made, he had asked I whether he had obtained a licence; the answer was that he had *applied*. Later, he told M that he had *obtained* a licence; this, to his knowledge, was untrue. By this representation M was induced to enter into the contract, and in accepting I's statement, M was following the usual practice among merchants. The umpire awarded damages, and Rowlatt, J., affirmed the award. The decision was reversed by the Court of Appeal.

The order, said Bankes, L.J., "is a clear and unequivocal declaration by the Legislature in the public interest that this particular kind of contract shall not be entered into . . . as the language of the order clearly prohibits the making of the contract, it is open to a party, however shabby it may appear to be, to say that the Legislature has prohibited this contract, and therefore it is a case in which the court will not lend its aid to the enforcement of the contract."<sup>1</sup>

The words of the order, said Scrutton, L.J., made it clear that a party must *make inquiries* to see whether or not he was violating the order: "the fact that the person who entered into the contract honestly believed that he was not breaking the statute, because he was told by the other party that he had a licence, is no defence."<sup>2</sup>

<sup>1</sup> *Ib.*, at 724, referring to McCardie, J.'s judgment in *Brightman & Co. v. Tate* [1919] 1 K.B. 463, 467; the language of Holt, C.J., in *Bartlett v. Vinor* (1692), Carth. 251, 252; and the statement of Lord Ellenborough, C.J., in *Langton v. Hughes* (1822), 5 B. & Ald. 335, 341: "what is done in contravention of the provisions of an Act of Parliament, cannot be made the subject-matter of an action." See also *Waugh v. Morris* (1876), L.R. 8 Q.B. 202, 208, "Where a contract is to do a thing which cannot be performed without a violation of the law it is void, whether the parties knew the law or not."

<sup>2</sup> *Ib.*, at 728. Glanville Williams (*loc. cit.*, at 52, Note 7) cites the *Restatement of the Law of Contracts*, 599, for a contrary rule: "Where the illegality of a bargain is due to . . . statutory or executive regulations of a minor character relating

"If the contract is prohibited by statute, the court is bound not to render assistance in enforcing an illegal contract."<sup>1</sup>

The plaintiff had made two points: *First*, a person could not plead, he had argued: "Protect me from my own illegality." The answer of Scrutton, L.J., is decisive:

"... the court is bound, once it knows that the contract is illegal, to take the objection and to refuse to enforce the contract, whether its knowledge comes from the statement of the party who was guilty of the illegality, or whether its knowledge comes from outside sources. The court does not sit to enforce illegal contracts. There is no question of estoppel; it is for the protection of the public that the court refuses to enforce such a contract."<sup>2</sup>

*Secondly*, the plaintiff relied upon the principle that where a contract could be performed lawfully or unlawfully, and the defendant, without the plaintiff's knowledge, elected to perform it unlawfully, he could not plead its illegality. This principle, says Scrutton, L.J., does not apply where the contract is "altogether prohibited" and where the contract with a person without a licence is altogether prohibited:

"if the act is prohibited by statute for the public benefit, the court must enforce the prohibition, even though the person breaking the law relies upon his own illegality."<sup>3</sup>

Despite the acute criticism of a learned writer,<sup>4</sup> both the decision, it is submitted, and the reasoning are right. It is difficult to see how, *upon the interpretation of this order*, the court could have come to any other conclusion.

## 2. Subject to Licences and "War Clause"

Where an order for the supply of goods is accepted "*subject to the necessary licences, etc., being in order and subject to Government restrictions as to sales and war clause*," the words "war clause" are vague and there is no contract: *Bishop and Baxter, Ltd. v. Anglo-Eastern Trading and Industrial Co., Ltd.*<sup>4</sup>

to a particular business which are unknown to one party, who is justified in assuming special knowledge by the other party of the requirements of the law, the illegality does not preclude recovery by the ignorant party of compensation for any performance rendered while he is still justifiably ignorant, or for losses incurred or gains prevented by non-performance of the bargain." Cited also, *loc. cit.*, at 55, as well as the *Comment* "If, on discovering the illegality [the innocent party] renders no further performance, he can recover the same damages that would be recoverable for any wrongful breach of contract." Upon which, in note 26, Williams refers to Salmond & Winfield, *Contracts*, 157-9; Williston, s. 1631.

<sup>1</sup> *Ib.*, at 729, citing *Cope v. Rowlands* (1836), 2 M. & W. 157, *per* Parke, B.

<sup>2</sup> *Ib.*, at 729.

<sup>3</sup> Glanville Williams, *loc. cit.*

<sup>4</sup> [1944] 1 K.B. 12; (1943), 2 All E.R. 598.

The respondents "ordered" by letter 20,000 cardigans as per sample at the rate of 2,500 per month, destined for U.S.S.R. They had applied for the free quota coupons and export licence. The appellants accepted the order "subject to the necessary licences, etc., being in order and subject to Government restrictions as to sales and war clause." The Court of Appeal, reversing a judgment of Atkinson, J., held that until the parties had agreed on the form and content of a war clause, there was no *consensus ad idem*.<sup>1</sup>

It was urged that both parties thought a contract existed; the respondents had in fact accepted 3,000 cardigans.

"If those two letters . . . constituted no completed contract, the misapprehension of the respondents could not turn them into one."<sup>2</sup>

In *Love & Stewart, Ltd. v. Instone, Ltd.*,<sup>2</sup> the words "subject to strike and lock-out clauses" required the parties to agree upon a particular clause before there could be *consensus ad idem*. In *Scammell v. Ouston*,<sup>3</sup> where an order was given "on the understanding that the balance of purchase price can be had on hire-purchase terms over a period of two years," there was no concluded contract. Lord Wright said: "The furthest point they reached was an understanding or agreement to agree upon hire-purchase terms." In *May & Butcher, Ltd. v. R.*<sup>4</sup> Lord Dunedin had said:—

"To be a good contract there must be a concluded bargain, and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties. Of course it may leave something which still has to be determined, but then that determination must be a determination which does not depend upon the agreement between the parties."

The phrase, in the present case, gave no clue to any particular war contingencies; no implication from deliveries or payment could take the place of a further agreement.<sup>5</sup>

## D. C.I.F. CONTRACTS

### 1. Nature

A "c.i.f." contract "involves the bringing into existence by the seller of two subsidiary contracts, viz.: affreightment and insurance."<sup>6</sup>

<sup>1</sup> *Ib.*, at 599.

<sup>2</sup> (1917). 33 T.L.R. 475.

<sup>3</sup> [1941] A.C. 251.

<sup>4</sup> Reported in note to *Foley v. Classic Coaches, Ltd.* [1934] 2 K.B. 1, 21.

<sup>5</sup> [1944] 1 K.B. at 16. (1943), 2 All E.R., at 600.

<sup>6</sup> In *Arnhold Karberg & Co. v. Blythe, Green, Jourdain & Co.* [1915] 2 K.B. 379, 388, Scrutton, J., said: "A c.i.f. sale is not a sale of goods but a sale of documents relating to goods."

Bankes, L.J., disapproved, saying: "I prefer to look upon it as a contract for the sale of goods to be performed by the delivery of documents, and what



The classic definition of a "c.i.f." contract was given by Hamilton, J., in *Riddell Brothers v. E. Clemens Horst & Co.*<sup>1</sup>

"A seller under a contract of sale containing such terms has firstly to ship at the port of shipment goods of the description contained in the contract; secondly, to procure a contract of affreightment, under which the goods will be delivered at the destination contemplated by the contract; thirdly, to arrange for an insurance upon the terms current in the trade which will be available for the benefit of the buyer; fourthly, to make out an invoice as described by Blackburn, J., in *Ireland v. Livingston*,<sup>2</sup> or in some similar form; and finally, to tender these documents to the buyer so that he may know what freight he has to pay and obtain delivery of the goods if they arrive, or recover for their loss if they are lost on the voyage. Such terms constitute an agreement that the delivery of the goods, provided they are in conformity with the contract, shall be delivery on board ship at the port of shipment."

When does the duty of the buyer to pay, arise?

"Against tender of these documents," Hamilton, J., continued, "the bill of lading, invoice and policy of insurance, which completes delivery in accordance with that agreement, the buyer must be ready and willing to pay the price."<sup>3</sup>

If the seller does not effect an insurance on the goods for their transit, they are *not delivered* in accordance with the contract, even though they arrive safely: nor is the buyer bound to accept or pay for them: *Orient Co. v. Brekke*.<sup>4</sup>

The key to many questions which will arise out of the present war is the precise date on which the property has passed. Another question is the position of a bank holding a set of documents, when the goods, consigned to a person who has become an enemy, have been lost at sea. The bank may be holding on behalf of a branch bank in territory which became

these documents are must depend upon the terms of the contract itself" [1916] 1 K.B. 495, 510. See Chalmers, 102, notes to s. 32. "... the cases show that it is a contract for the sale of insured goods, lost or not lost, to be implemented by the transfer of proper documents." And see *The Gabiano* (1943), 19 Asp. Mar. L. Cas. (N.S.), 371, 373, per Sir Boyd Merriam, P.

<sup>1</sup> [1911] 1 K.B. 214, 220, 221, followed by Kennedy, L.J., in the Court of Appeal: [1911] 1 K.B. 934, at 952 963, and affirmed in the House of Lords. [1912] A.C. 18. "The bill of lading in law and in fact represents the goods. Possession of the bill of lading places the goods at the disposal of the purchaser": per Kennedy, J., at [1911] 1 K.B. 956, 957. He cites the famous statement of Bowen, L.J., in *Sanders v. MacLean* (1883), 11 Q.B.D. 327, 341. "It (i.e., the bill of lading) is a key which in the hands of a rightful owner is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be."

<sup>2</sup> (1872), L.R. 5 H.L. 395, 406; Benjamin, *Sale of Personal Property* (1931), 7th ed., 740-744.

<sup>3</sup> [1911] 1 K.B., at 221.

<sup>4</sup> [1913] 1 K.B. 531, 537, per Rowlatt, J.

enemy occupied. Goods consigned to places which became enemy occupied have been diverted to British ports, and requisitioned.

## 2. *Export Licence ; Onus upon Seller*

A contract for the import or export of goods prohibited to be imported or exported except under licence, becomes illegal to perform unless such licence is obtained.

It is an implied term of a c.i.f. contract for the export of goods that the sellers use their best endeavours to obtain an *export licence* ; if they do so, they are not liable in damages for failure to obtain a licence.<sup>1</sup>

By a contract made in London in August, 1915, the appellants sold to the respondents, both resident in England, 50 tons of aluminium to be shipped to Vladivostock in December/January at a price including cost and freight ; payment, cash against documents in London. At the date of the contract, both parties knew that, except under licence, the export of aluminium was prohibited. In December, all dealings in war materials by any person amenable to British law, from any country (including America) were prohibited without a permit. No aluminium was shipped under the contract ; the buyers claimed damages. The sellers had applied for an export licence which had been refused. The contract, it was held, did *not* impose upon the sellers an *absolute obligation* to ship or to pay damages in default ; having used *reasonable diligence* to obtain a licence, they were not liable to the buyers.<sup>2</sup>

The duty of the sellers, said Viscount Reading, C.J., was "to use their best endeavours to obtain a permit."

"If a licence cannot be obtained, aluminium cannot be shipped, and I cannot see why the law should imply an absolute obligation to do that which the law forbids. A shipment contrary to the prohibition would be illegal, and an absolute obligation to ship could not be enforced. I cannot agree that, in order to give to the contract its business efficacy, it is a necessary implication that the sellers undertook an absolute obligation to ship whether a licence was or was not obtained."<sup>3</sup>

<sup>1</sup> *In re an Arbitration between The Anglo-Russian Merchant Traders, Ltd., and John Batt & Co. (London), Ltd.* [1917] 2 K.B. 679. See also *J. W. Taylor & Co. v. Landauer & Co.* (1940), 4 All E.R. 335 ; *Krusin & Rogers*, II, 751.

<sup>2</sup> The Court of Appeal reversed Bailhache, J., who had held that, to be relieved from liability, the sellers, who had entered into an unconditional contract, should have made their contract subject to their being able to obtain a permit.

<sup>3</sup> At 685, 686. And see 689, *per* Scrutton, L.J. *The Moorcock* was cited : (1889), 14 P.D. 64, 68. "In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties, who are business men ; not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure . . ." : *per* Bowen, L.J.

### 3. Import Licence ; Onus upon Buyers

Where A agrees to buy goods from the Sudan at an agreed price, c.i.f., and to *pay cash after approval of the goods at the port of arrival*, and where, upon the arrival of the goods, A has *accepted the shipping documents*, and the property in the goods has passed, the onus of obtaining a licence is upon him : *Mitchell Cotts & Company (Middle East), Ltd. v. Hairco, Ltd.*<sup>1</sup>

The contract, made in 1941, was for the importation from the Sudan of two tons of goat hair, c.i.f., war risks to be covered by the buyers, *net cash after approval of the goods at the port of arrival*. The goods were shipped to Manchester. Import of goat hair is prohibited except subject to conditions in the Anthrax Order, 1935. Under the Import of Goods (Control) Order, 1940, the import of all goods (save live quadruped animals) was prohibited except under licence.

On arrival, the goods were put into an emergency customs warehouse in bond (as was required under the order), and it was impossible for the importers to get a sample and to express approval or disapproval.

The property had passed at the latest when the buyers received the shipping documents. Before the ship arrived, the buyers had become the owners of the goods, and it was their contractual duty to obtain the licence or to take reasonable steps to do so.

### 4. When Contract Abrogated by War

(a) If the seller becomes an alien enemy, or the goods are to be delivered to an enemy country, the buyer is justified in refusing to accept the shipping documents, since the *further performance of the contract* would constitute *trading with the enemy* : *Duncan, Fox & Co. v. Schrempft & Bonke.*<sup>2</sup>

In May, 1914, an English firm in Liverpool sold to another English firm in Liverpool 300 barrels, June and/or July shipment, Chilean honey, per steamer, c.i.f., to Hamburg; payment, net cash in Liverpool, in exchange for shipping documents on presentation. The honey was shipped in June on a German steamship for Hamburg, there to be delivered to the claimants or their assigns. On 5th August, 1914, the claimants tendered the shipping documents to the respondents who refused to accept them. The ship had not yet arrived at Hamburg but had put into a neutral port for refuge. The buyers were justified in refusing the documents.

(b) Where, upon the outbreak of war, *either of the subsidiary contracts*, i.e., the contract of affreightment or the contract of insurance, has become illegal to perform, *the whole contract is illegal*, and the buyer is entitled to refuse the tender : *Arnhold Karberg & Co. v. Blythe, Green, Jourdain & Co.*<sup>3</sup>

<sup>1</sup> [1943], 2 All E.R. 552.

<sup>2</sup> [1915] 3 K.B. 355, 364, *per* Swinfen Eady, L.J.

<sup>3</sup> [1916] 1 K.B. 495. See *The Oltenia* (1944), 1 Ll.P.C. (2nd), 167, 170.

Two "c.i.f." contracts for the sale of beans, to be shipped from Chinese ports to Naples and Rotterdam, respectively, contained a provision that payment was to be made in net cash in London on arrival of the goods at port of discharge in exchange for bills of lading and policies of insurance. The beans were shipped in July, 1914, on German vessels; upon the outbreak of war, the vessels entered ports of refuge in the East, where they remained. After three months from the date of the bills of lading—the latest date for payment provided in the contracts—the sellers tendered to the buyers the shipping documents; in one case, a German bill of lading and an English policy of insurance, in the other case, a German bill of lading and a German policy of insurance. The buyers, in each case, refused to accept the tender or to pay the price. This refusal the Court of Appeal upheld; the documents tendered must be "effective shipping documents"; the contract of affreightment was dissolved<sup>2</sup> and the obligations in the bill of lading could not be carried out.

"In order truly to perform his contract," said Warrington, L.J., "he has to deliver documents by virtue of which the buyers may, if the goods are in existence, obtain delivery of them, and by virtue of which, if the shipowner has not fulfilled his obligation imposed by the contract of affreightment, he, the buyer, may have such remedies as the contract of affreightment would give him. Neither of those conditions is fulfilled by the delivery of a document evidencing a contract which has been dissolved by the outbreak of war and the further performance of which has become impossible."<sup>3</sup>

(c) *In the absence of illegality* in tendering documents calling for delivery, *mere impossibility of performance* does not prevent the tender of documents from being valid.<sup>4</sup>

In June, 1914, the sellers sold to the buyers 10,000 cases of bean oil, shipped from an Oriental port, c.i.f. to Antwerp. The buyers were to pay the full amount of provisional invoice made out on net shipping weights, by cash without discount against shipping documents, on arrival of steamer in Antwerp, or three months after notice of arrival of documents in London (whichever happened first). In July, the sellers declared in part fulfilment 3,000 cases shipped in a British vessel for Antwerp, and rendered provisional invoices. On 5th August, the sellers notified the buyers that the documents had arrived in London; they asked for payment on 27th August. On 18th August, the sellers tendered the shipping documents. Antwerp was still in

<sup>1</sup> [1916] 1 K.B., at 506, *per* Swinfen Eady, L.J.

<sup>2</sup> *Esposito v. Bowden* (1857), 1 El. & Bl. 783, 787, *per* Willes, J.

<sup>3</sup> [1916] 1 K.B., at 514.

<sup>4</sup> *In re an Arbitration between Weiss & Co., Ltd., and Crédit Colonial et Commercial (Antwerp)* [1916] 1 K.B. 346, 350.

possession of the Germans; the ship had been seized by the Germans and detained at Hamburg. The buyers did not take up the documents.

"As between the parties," said Bailhache, J., "there was no illegality in tendering documents which called for delivery in Antwerp which had not yet fallen. Nor was it illegal to call upon the shipowner to deliver at Antwerp; . . ."

"The fact that it became impossible to perform the contract did not prevent the tender of the documents from being valid."

#### 5. War Risk for Buyer's Account

In *Groom (C.), Ltd. v. Barber*, a c.i.f. contract contained the clause: "War risk for buyer's account." The words meant "war risk is the buyer's concern, and if he wants to cover war risk he must get it done."<sup>1</sup>

In *Oulu Osakayetio of Oulu v. Arnold Laver & Co., Ltd.*,<sup>2</sup> it was provided in a contract made in October, 1938, for the sale of wood goods to be shipped from Finland to Hull, that any increase in premium for war and strike risks, "in excess of the rates ruling at 26th September, 1935, was to be for buyer's account." The war risk on cargoes from the Baltic to the United Kingdom was then 3d. per cent. The sellers' agents chartered a Spanish steamer and contracted with Lloyd's underwriters to cover war risks at a premium of 3s. 6d. per £100 if the ship sailed before 5th November, 1938, and thereafter, at schedule rate. At that date, war risk normally was 2s. 6d., but Spanish steamers had been excluded from the agreed minimum and the rates were left to the underwriters' discretion. On 2nd November, 1938, owing to the Spanish Civil War, the war risks rate for Spanish ships rose considerably, and the insurers fixed the premium at £5 per cent. The *El Neptuno* sailed on 12th November. The sellers claimed from the buyers the increase of premium from 3d. to £5 per cent., viz., £4 19s. 9d. per cent.

The Court of Appeal held that on the proper construction of the contract, "increase of premium" meant "any increase in the ruling or market rate of premium for war risks," i.e., for war risks in general.<sup>3</sup> The ruling or market rate was 2s. 6d.; the rate prevailing for Spanish ships which were excluded from ordinary rates, was irrelevant. The buyers must pay the difference between 3d., the market rate in September, 1935, and 2s. 6d., the market rate in October, 1938.<sup>4</sup>

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<sup>1</sup> [1915] 1 K B. 316, 322, *per* Atkin, J.

<sup>2</sup> [1940] 1 K.B. 750.

<sup>3</sup> *Ib.*, *per* Goddard, J., at 758.

<sup>4</sup> *Ib.*, *per* Luxmoore, L.J., at 758.

In *Finska Cellulosaföreningen v. Westfield Paper Company, Ltd.*,<sup>1</sup> the bill of lading dated January, 1940, referred to "all conditions and exceptions as per charterparty" and contained a clause entitled "F.A.A. Current War Risk Clause," giving the master a discretion, "if war or hostilities rendered the prosecution of the voyage unsafe," to land the goods, at shippers' risk and expense, at any port he considered safe, where the voyage should be considered terminated. The sale was of wood pulp from Finland. The tender of the bill of lading duly endorsed was a sufficient compliance with the contract. The clause was usual and current in the trade, and the bill of lading was not defective by reason of its inclusion.

#### 6. *Tender of Documents after Goods Lost*

(a) The buyer is not entitled to refuse to accept a tender of the documents if the goods, before the tender, have been lost: *Groom (C.), Ltd. v. Barber, supra*.

On 20th August, the sellers, having received information of shipment from Calcutta, sent an invoice to the buyers, meaning that they were in a position to deliver the documents under the contract. On 21st August, the loss of the ship was posted at Lloyd's; it had been captured and sunk on 6th August. The policy contained the "free from capture and seizure clause," and did not cover war risks. On 22nd August, the buyers returned the invoices.

"The contract of the seller is performed," said Atkin, J., "by delivering to the buyer within a reasonable time from the agreed date of shipment the documents . . . which will entitle the buyers to obtain on arrival of the ship delivery of goods shipped in accordance with the contract, or in case of loss will entitle him to recover on the policy the value of the goods if lost by a peril agreed in the contract to be covered, and in any case will give him any rightful claim against the ship in respect of any misdelivery or wrongful treatment of the goods."<sup>2</sup>

(b) The seller can make an effective tender of the documents even though at the time of the tender he knows that the goods are lost: *Manbre Saccharine Co., Ltd. v. Corn Products Co., Ltd.*<sup>3</sup>

In October and November, 1916, two c.i.f. contracts were made for the purchase of starch and syrup, respectively, from America. On 14th March, 1917, the seller enclosed bills of lading, invoices and insurance cover for starch and syrup shipped on *The Algonquin*. The ship had sailed in February; she was sunk on 12th March. Of this fact the sellers were aware before 14th March. The buyers wrongfully declined to accept the documents as a delivery against the contracts.

<sup>1</sup> (1940), 4 All E.R. 473, 477, 488, per Viscount Caldecote, C.J.

<sup>2</sup> [1915] 1 K.B., at 324.

<sup>3</sup> [1919] 1 K.B. 198.

The essential feature, said McCardie, J., differentiating an ordinary c.i.f. contract from an ordinary contract for the sale of goods, is that performance of the bargain is by *delivery of documents*, not by delivery of goods<sup>1</sup> :—

“All that the buyer can call for is delivery of the customary documents. This represents the measure of the buyer's right and the extent of the vendor's duty. The buyer cannot refuse the documents and ask for the actual goods, nor can the vendor withhold the documents and tender the goods they represent.”

Then follows a citation from Scrutton, *Charterparties*<sup>2</sup> :—

“There may be cases in which the buyer must pay the full price for delivery of the documents, though he can get nothing out of them, and though in any intelligible sense no property in the goods can ever pass to him, i.e., if the goods have been lost by a peril excepted by the bill of lading, and by a peril not insured by the policy, the bill of lading and the policy yet being in the proper commercial form called for by the contract.”

Thus, if the vendor ships the appropriate goods in the appropriate manner under a proper contract of carriage and obtains the proper documents for tender to the purchaser, the rights and duties of the parties are unaffected either by the loss of the ship or goods, or by the vendor's knowledge of the loss, before the tender of the documents.

“He can make an effective tender even though he possess at the time of tender actual knowledge of the loss of the ship or goods. For the purchaser in case of loss will get the documents he bargained for; and if the policy be that required by the contract, and if the loss be covered thereby, he will secure the insurance moneys. The contingency of loss is within and not outside the contemplation of the parties to a c.i.f. contract.”<sup>3</sup>

#### 7. *No Special Notice Requisite*

By s. 32 (3) of the Sale of Goods Act, 1893 :—

“Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit.”

This obligation does not apply to a c.i.f. contract made in time of peace, for the contract itself provides for all the

<sup>1</sup> [1919] 1 K.B., at 202.

<sup>2</sup> 8th ed., 167, notes to art. 59; 14th ed., 206, 207.

<sup>3</sup> [1919] 1 K.B., at 204.

insurance contemplated or usual: *Law & Bonar, Ltd. v. British American Tobacco Co., Ltd.*<sup>1</sup>

In May, 1914, the defendants bought from the plaintiffs, Calcutta hessian, c.i.f. Smyrna, to be shipped from Calcutta and to arrive at Smyrna by September. The goods were to be at the seller's risk until actual delivery. They were shipped on a British steamship, the bill of lading being dated 20th July, 1914, and were insured by a policy containing the f.c. and s. clause. On 13th August, the ship was sunk and the goods were lost. Neither the fact of the shipment nor the fact of the loss was known to the sellers (whose business was in London) until later. The buyers refused to accept and pay for the goods, and the sellers sued for damages. The buyers maintained that they should have been informed of the steamer by which the goods were shipped.

The subsection, said Rowlatt, J., giving judgment for the sellers, clearly did not apply to a c.i.f. contract in time of peace and when insurance against war is not usually effected.

### E. F.O.B. CONTRACTS

"An 'f.o.b.' contract is one under which the seller is to put the goods on board at his own expense on account of the buyer."<sup>2</sup>

#### 1. Notice to Buyer, Requisite

(a) The seller, under an f.o.b. contract, must give *such notice* to the buyer, under s. 32 (3) of the Sale of Goods Act, *as may enable him to insure* the goods during their sea transit: *Wimble v. Rosenberg*.<sup>3</sup>

The plaintiff sold to the defendant bags of rice, "f.o.b. Antwerp, to be shipped as required by the buyers, cash against bill of lading." The buyers sent instructions to the sellers to ship the goods to Odessa and to pay freight on their account, leaving it to the sellers to choose the ship. On 24th August, the goods were shipped; the steamer sailed on the 25th; stranded and became a total loss on the 26th. The buyers received no notice of shipment until the 29th, when the bills of lading were presented for payment. No insurance had been effected; they refused to pay for the goods on the ground that they had not been given the notice required under s. 32 (3). It was held that they had all the information necessary to enable them to

<sup>1</sup> [1916] 2 K.B. 605, 608.

<sup>2</sup> *Per* Buckley, L.J., in *Wimble v. Rosenberg* [1913] 3 K.B. 743 752. The goods are then at buyer's risk and he is responsible for freight and charges: see *Chalmers*, 100. The buyer cannot claim delivery of the goods before shipment.

<sup>3</sup> *Hamilton, L.J.*, dissenting (755-764). Historically the rule in s. 32 (3) was a rule of Scots law only: f.o.b. contracts were outside its scope (at 762, 763).



insure; there was no obligation to give notice of the shipment on a particular ship.<sup>1</sup>

The requisite "notice" will be deemed to have been given if either (a) the buyer is already in possession of knowledge of all the necessary facts, or (b) if such notice completes his necessary knowledge of the facts.<sup>2</sup>

(b) The notice need not be in any given form; if, on the facts, the buyer has sufficient knowledge to enable him to insure, the goods are at the buyer's risk.<sup>3</sup>

The plaintiffs sold to the defendants a quantity of nails, to be delivered f.o.b. New York, for shipment to the destination specified by the defendants on receipt of shipping instructions; cash against shipping documents. In June, 1916, the defendants sent an order, specifying the shipping marks. On 16th August, the plaintiffs gave the defendants notice that the goods would soon be made. On 24th August, the goods were shipped from New York. On 26th August, the shipowners notified the defendants that the ship had sailed; by 6th September, the defendants knew that the goods had been shipped. On 18th September, the ship was torpedoed and the goods were lost; the defendants had not insured the goods. Since the defendants, before shipment, had sufficient knowledge of the facts to enable them to insure, the sellers could recover.

## 2. *Export Licence; Onus upon Buyer*

The duty of obtaining a licence where the contract is f.o.b. lies upon the buyers, for it is their duty to provide an effective ship, i.e., a ship which can legally carry the goods: *Brandt (H.O.) & Co. v. Morris (H.N.) & Co.*<sup>4</sup>

Manchester merchants (buying on behalf of American bleacheries) gave to chemical manufacturers in Manchester a bought note for sixty tons of aniline oil. The contract was for five monthly deliveries, "f.o.b. Manchester." After the contract was made, the export of aniline oil was prohibited except under licence. The plaintiffs sued for non-delivery.

Viscount Reading, C.J., declared:—

"They had contracted to sell f.o.b. They had therefore contracted to put the oil on board a vessel selected, not by them, but by the plaintiffs. It was the duty of the plaintiffs to find the ship, and the facts which it was necessary to state when a licence had to be applied for, were known to them and

<sup>1</sup> The mercantile meaning of f.o.b. stated by Brett, M.R., in *Stock v. Inglis* (1884), 12 Q.B.D. 564, 573, was adopted by Lord Blackburn in (1885), 10 App. Cas. 263, 271, 273. See *per* Hamilton, L.J., in [1913] 3 K.B., at 759, 760.

<sup>2</sup> [1913] 3 K.B., *per* Buckley, L.J., at 753, 754.

<sup>3</sup> *Northern Steel & Hardware Co., Ltd. v. John Butt & Co. (London), Ltd.* (1917), 33 T.L.R. 516.

<sup>4</sup> [1917] 2 K.B. 784.

not to the defendants. All that the sellers know in such a case is that they have sold the goods to their buyers."<sup>1</sup>

And Scrutton, L.J., said :—

"The buyers must provide an effective ship, that is to say, a ship which can legally carry the goods. When the buyers have done that the sellers have to put the goods on board the ship. If that is so, the obtaining of a licence to export is the buyers' concern."<sup>2</sup>

<sup>1</sup> [1917] 2 K.B., at 795.

<sup>2</sup> *Ib.*, at 798.

## CHAPTER X

### NEGOTIABLE INSTRUMENTS

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#### A. AT COMMON LAW

##### 1. *Where Instrument in Hands of Alien Enemy*

(a) No action may be brought during war upon a negotiable instrument made before the war and in the hands of an alien enemy.<sup>1</sup>

(b) Nor may an action be brought, even upon the restoration of peace, if, during the war, the instrument were transferred to an alien enemy : *Willison v. Patteson*.<sup>2</sup>

<sup>1</sup> See E. J. Schuster, *The Effect of War on Commercial Transactions* (1914), 34-41.

<sup>2</sup> (1817), 7 Taunt. 439, 449, per Burrough, J.

A British subject, resident in England, held the proceeds of certain goods of A, an alien enemy. A drew on the defendant, payable to his own order and indorsed the bill to the plaintiff, an Englishman, resident in an enemy country, who, on the restoration of peace, sued upon the bill.

"The bill is a contract; and no contract can be enforced in a court of *British* judicature which is made during the war, and which is made by an alien enemy."

(c) An alien enemy who has received from the Crown a *licence to trade* is not subject to such *disabilities*: *Direction der Disconto-Gesellschaft v. A. H. Brandt & Co.*<sup>1</sup>

## 2. Position of Neutral

(a) Where a bill of exchange is drawn by a German firm, and accepted by an English firm before the war, but, after maturity is indorsed to an American firm in America, which contains two alien enemy partners (members of the German firm), the *acceptors are not liable*.<sup>2</sup>

(b) A *neutral*, to whom a bill of exchange has been transferred by an alien enemy during war, *may probably sue* upon it in the English courts.<sup>3</sup>

## 3. Between Prisoners of War

An alien enemy to whom a bill has been drawn in England by a British subject interned as a prisoner of war in an enemy country, payable to another British subject similarly interned, and indorsed by the payee, may, upon the restoration of peace, bring an action upon the bill: *Antoine v. Morshead*.<sup>4</sup>

## 4. When Interest does not run

Where a *right of action* upon a bill is *suspended* during war, *no interest* in respect of the period covered by the war is recoverable.<sup>5</sup>

<sup>1</sup> (1915), 31 T.L.R. 586. See the judgment of Bray, J., at 587-589. See also *Public Trustee v. Davidson* [1925] S.C. 451, 457, *per* Lord Murray.

<sup>2</sup> *Weld & Others v. Fruhling & Goschen* (1916), 32 T.L.R. 469, 470, *per* Bailhache, J. The endorsement was made after the beginning of the war. The case was decided under Trading with Enemy Amendment Act, 1914 s. 6 (2).

<sup>3</sup> 2 Pitt Cobbett, 109.

<sup>4</sup> (1815), 6 Taunt. 237, 240. See also *per* Gibbs, C.J., at 239.

"I hope a British prisoner of war is not to be considered as an alien enemy" said Park, J., in *Willison v. Patterson* (1817), 7 Taunt. 439, 449.

And see *Vandyke v. Adams* [1942] Ch. 155, 157, where Farwell, J., held that a British prisoner of war was not an "enemy" within Trading with the Enemy Act, 1939, s. 2 (1) (b). See note, *infra*, 276.

<sup>5</sup> 2 Pitt Cobbett, 108, 109. In the *Stevenson Case* [1918] A.C. 239, 245, Lord Finlay, L.C., questions this principle, saying: "It is difficult to see on what principle the interest is to be forfeited if private property is to be respected." He did not think that the American decisions in *Hoare v. Allen* (1789), 2 Dallas 102, and *Brown v. Hiatts* (1872), 15 Wallace 177, were in conformity with English law. See also at 255, 256, *per* Lord Atkinson.

The payee of a promissory note made abroad, sued upon it after thirty-four years, during the greater part of which he had been an alien enemy. The awarding of interest, it was held, was a matter for the jury : *Du Belloix v. Lord Waterpark*.<sup>1</sup>

"But there is another objection," observed Abbott, C.J., "to the plaintiff's recovering interest on the debt, for during the greatest part of that time he was an alien enemy, and could not have recovered even the principal in this country, and at all events during that portion of the time the interest could not have run . . ."<sup>2</sup>

## B. UNDER TRADING WITH ENEMY ACT, 1939

Attention should be drawn to the following points:—

### 1. *Transmission and Transfer*

(a) The *prohibition* against paying or transmitting any negotiable instrument or security for money to or for the benefit of an enemy or to a place in enemy territory.<sup>2</sup>

(b) The *ineffectiveness* of the transfer of a negotiable instrument by or on behalf of an enemy, and any subsequent transfer, to confer any rights or remedies against any party to the instrument, *except with the sanction of the Treasury*.<sup>3</sup>

### 2. *Rights and Duties of Custodian*

(a) The *duty to pay* to the Custodian (subject to an authority given by a Secretary of State, the Treasury or the Board of Trade to pay to any other person),<sup>4</sup> money which, but for the war, would be payable to or for the benefit of a person who is an enemy, and in particular any securities which have become payable on maturity or by being drawn for payment or otherwise.<sup>5</sup>

(b) The *duty of the Custodian* (subject to the directions of the Board of Trade) *to hold* money paid or property and the right to transfer property vested in him until the end of the war and then to deal with it as the Board of Trade direct.<sup>6</sup>

(c) The *discretion* of the Custodian, under directions of the Board, *to pay over* any particular money or to transfer any particular property vested in him to or for the benefit of the person who would have been entitled to it, or to any person authorised by him to receive it.<sup>7</sup>

<sup>1</sup> (1822), 1 D & R. 16, 19 For the right of interest, *supra*, . . .

<sup>2</sup> See Trotter, 92, 93, and Campbell, 228-230. Section 1 (2) (a) (ii), *supra*, 202.

<sup>3</sup> Section 4 (1), *supra*, 203.

<sup>4</sup> S.R. & O., 1939, No. 1198, art. 1 (v) (a)

<sup>5</sup> *Ib.*, art. 1 (i), (ii) (b), *supra*, 220.

<sup>6</sup> Article 3 (i), *supra*, 221.

<sup>7</sup> *Ib.*, art. 3 (ii). See S.R. & O., 1940, No. 105.

## C. RECENT DECISIONS

1. *General Acceptance of Bill*

The acceptance, *without qualification*, of a bill of exchange drawn in Poland on a firm in London, payable in Amsterdam, is a *general acceptance* and, even though the bill is not presented for payment in Amsterdam, the acceptors are liable in an action on the bill brought in London: *Banku Polski v. K. J. Mulder and Co.*<sup>1</sup>

The bank sued the company as holders of five bills of exchange for value for various amounts in Dutch florins, drawn in Poland on 1st May, 1939, payable on 1st November, 1939, and all accepted. The bills were addressed to the company in London, payable at Amsterdam at the Deutsche Bank. The plaintiff bank were indorsers and they refused to pay. They pleaded that by Dutch and by English law presentment for payment at the bank in Amsterdam, followed by protest in the event of non-payment, was necessary and that the bills had not been presented or protested.

By s. 19 of the Bills of Exchange Act, 1882: "an acceptance to pay at a particular place is a general acceptance, unless it expressly states that the bill is to be paid there only and not elsewhere." The emphasis, Tucker, J., pointed out, is on the word "*only*": "if an acceptor merely accepts a bill payable at a named place, it remains a general acceptance for the purpose of the section."<sup>2</sup> It is only if he accepts expressly to pay at a specified place only, and not elsewhere, that it becomes a general acceptance." By s. 45, subject to the Act, a bill must be duly presented for payment, otherwise drawers and indorsers will be discharged. By s. 52 (1), when a bill is accepted generally, presentment for payment is not necessary to render the acceptor liable. The contract was governed by English law and not by Dutch law: performance was not bound to take place in Holland. By s. 72 (3), the duties of the holder concerning presentment for payment are determined by the law of the place where the act is done or the bill is dishonoured.

On appeal the defendants abandoned the point that Dutch law applied and argued that the acceptance was "qualified." They said that the acceptance was "local" within s. 19 (2) (c) — "an acceptance to pay only at a particular specified place" — and therefore, qualified. Lord Greene, M.R., declared that on the face of the bills the acceptance was clearly not local.<sup>3</sup> The defendants had further argued that since the bill was payable

<sup>1</sup> [1942] 1 K.B. 497, affirming the decision of Tucker, J., in *Banku Polskiego v. Moller Co.* [1941] 2 K.B. 286. Upon the plaintiff's name, see note at foot of p. 498, at [1942] 1 K.B.

<sup>2</sup> [1941] 2 K.B., at 267, 268, 269.

<sup>3</sup> [1942] 1 K.B., 497, 499.

in Dutch currency and was to be paid in Amsterdam, the parties intended that it should be paid in Amsterdam only. These matters could not amount to an "express statement" that the bill was to be paid in Amsterdam and not elsewhere.<sup>1</sup>

### 2. Dispensation with Presentment

Where, after exercising reasonable diligence, the holder of a bill cannot effect presentment, the fact that *presentment* at the place indicated has *become illegal* does not deprive the holder of his *right to recover*: *Cornelius v. Banque Franco-Serbe*.<sup>2</sup>

C contracted with a firm in Yugoslavia for the sale to them of cocoanut oil, which was duly delivered. By a regulation of the Treasury, payment was required to be made in Dutch guilders, and on 10th May, 1940, C received a cheque for Dutch guilders drawn in his favour by a French bank carrying on business in Belgrade, on a bank in Amsterdam. On 10th May the Germans invaded Holland, and on 21st May a notice in the *London Gazette* stated that Holland had been declared by the British Government to be enemy-occupied territory. Presentment at Amsterdam became physically impossible and illegal.<sup>3</sup> The bank declined to direct their London branch to honour the cheque and the plaintiff claimed payment of the cheque, alleging that presentment was excused.

Stable, J., held that under s. 46 (2) (a) "where after the exercise of reasonable diligence presentment, as required by this Act, cannot be effected," presentment was dispensed with. That means that the holder may call upon the drawer to pay: "where the only thing which is illegal is the presentment of the bill at the place indicated therein, it would defeat the whole object of the statute to hold that the holder of the bill, who *ex hypothesi* has not presented it, is precluded from suing on it."<sup>4</sup>

### 3. Right to Securities from Bank's Head Office

Where securities are deposited at the branch of a bank in a country which becomes enemy-occupied, the owner is entitled, without instructions from that branch, to delivery of securities from the head office in London: *Isaacs v. Barclays Bank, Ltd. and Barclays Bank (France), Ltd.*<sup>5</sup>

The plaintiff, who lived in Nice until it became enemy-occupied, had an account at the Monte Carlo branch of Barclays

<sup>1</sup> *Ib.*, at 500. See also the terse judgment of MacKinnon, L.J., at 500, 501, who said that the Act of 1882 was "the best drafted Act of Parliament ever passed," and that this case was "almost anticipated in precise terms by *Ex parte Hayward* (1887), 3 T.L.R. 687." See *Note* (1942), 58 L.Q.R. 296; Domke, 196.

<sup>2</sup> [1942] 1 K.B. 29.

<sup>3</sup> See *per* Younger, J., in *Re Francke & Rasch* [1918] 1 Ch. 470, 479.

<sup>4</sup> [1942] 1 K.B., at 34.

(1943), 2 All E.R. 682, 685; (1943), 169 L.T. 370.

(France), Ltd. In 1939 he had transferred some sterling securities to London where he could collect the interest and he had his dollar securities sent to New York. After the fall of France the securities held by their branches in France and elsewhere were placed under the control of the head office of the French bank (Barclays Bank (France), Ltd.) in London. That office refused to deal with the securities unless the plaintiff obtained authority from the Monte Carlo branch. In August, 1940, Monaco had become enemy territory. He claimed the securities and the accumulated interest.

It was argued for the bank that before the customer can demand payment of the balance standing to his credit on current account he must make a demand at the branch where his current account is kept. The same principle applied where it was sought to recover securities.

The facts, said Tucker, J., seemed to be "very special." The head office in London "stepped into the shoes of the Monte Carlo branch for all purposes connected with these securities." They collected the interest and credited the securities to the plaintiff in their accounts; even though they called that account a suspense account, they treated him as their customer. "A contractual relationship" came into being between the two, whether of banker and customer, or otherwise, which enabled the plaintiff—without the requirement of any intervention by the Monte Carlo branch—but subject to the provisions of the Defence (Finance) Regulations, 1939, the Trading with the Enemy (Custodian) Order, 1939, and the law of the United States of America, to claim from the head office of the French bank the return of his securities or the payment of the interest.

*Note on "Prisoners of War" (p. 272)*

Prisoners of war are not alien enemies: (1945), Cmd. 6591, paras. 8, 21.

The Limitation (Enemies and War Prisoners) Act, 1945, s. 1, distinguishes an "*enemy*" and a person "*detained in enemy territory*."

*Note on Bills of Exchange and Limitation of Actions*

See Cmd. 6591, para. 26. *The Committee on Limitation of Actions* recommended that no amendment should now be made to the Bills of Exchange Act, 1882; some amendment might ultimately be necessary as the result of the eventual Peace Treaties (cf. Treaty of Versailles, Art. 301). "The holder's rights against drawer and endorser are adequately protected by the law as it stands" (*ib.*, p. 12).

## CHAPTER XI

### LIFE INSURANCE

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#### 1. *When Contract Suspended during War*

PAYMENT under a contract of life insurance, if the insurer and the assured are divided by the "line of war," is *suspended* during war.<sup>1</sup> So far as the risk has not become illegal, the policy matures and on non-payment of premiums the policy lapses.<sup>2</sup>

There is no English authority, but in *Seligman v. Eagle Insurance Co.*,<sup>3</sup> Neville, J., made some observations upon the position of the assured who had insured his life with an English insurance company and, on returning to Germany, became an alien enemy :—

"It seems to me," he said, "this is one of those cases where the right is suspended.

"Were he to die to-morrow his executors could recover nothing from the company; but whenever peace is restored between the countries normal relations in this regard will be resumed, and, although the right of the policy-holder is undoubtedly suspended, if the policy itself is not made void either at the time when war is declared or at the time when

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<sup>1</sup> McNair, 266, 268, who regards a contract of life insurance "in a peculiar sense a piece of property" as falling within "the general intention" of Lord Dunedin's dictum in the *Ertel Bieber Case* [1918] A.C. 260, 269, 274, that *certain executory contracts*, "the concomitants of rights of property," made between subjects and enemies, are not abrogated by a state of war, which neither involve "intercourse" with the enemy, nor are against "public policy" as judicially interpreted.

Thus, also, Macgillivray, *Insurance Law* (1937), 2nd ed., 288, 289. See the propositions laid down at 281. "If such premium on a policy effected by a person who has become an alien enemy is tendered either on behalf of such alien enemy or by or on behalf of a friendly assignee, mortgagee or surety, the tender is a good tender of the premium and the office may lawfully accept it (at 286).

See Campbell, 206–209, who does not agree with this view. See McNair, 265.

<sup>2</sup> Macgillivray, *op. cit.*, 281, 289.

<sup>3</sup> [1917] 1 Ch. 519, Campbell (210, 211) criticises this decision severely.



the current year of the policy ran out, I can see nothing illegal in the acceptance of premiums by the company . . ."<sup>1</sup>

The company, before the war, lent money to a person who became an alien enemy. It was part of the terms of the loan that the borrower had to insure his life with the company on two policies of assurance; he covenanted to pay the premiums from year to year. Two sureties were to be found, and they were found. Of these, S was one. On the outbreak of war, he tendered the premiums which were accepted, reserving the question whether the contract of insurance was not at an end. Later, S tendered the whole amount due on the loan and asked for the return of the securities. The company refused to assign them except under a similar reservation. Neville, J., held that the contract was not determined by war; the receipt of the money constituted no unlawful intercourse with the enemy. No benefit would accrue to the alien enemy; some day, someone who was not an alien enemy might have the right to sue the company for the amount assured. Upon payment of the amount due, the company must assign the policies without reservation.<sup>2</sup>

## 2. *Under Trading with the Enemy Act, 1939*

(a) The Trading with the Enemy Act, 1939, contains no such provisions specifically referring to life insurance, as were found in the Trading with the Enemy Proclamation of 8th October, 1914.<sup>3</sup> But s. 4 of the Act of 1939, which invalidates (save with the sanction of the Treasury) the assignment of a chose in action by or on behalf of an enemy, applies equally to a policy of assurance. Moreover, it is forbidden to transmit any *security for money* to or for the benefit of an enemy or to a place in enemy territory.<sup>4</sup> British Life Offices hold a general authority from the Trading with the Enemy Branch to accept premiums paid by or on behalf of enemies.<sup>5</sup> The Trading with the Enemy Department permits insurance companies to apply surrender values towards the upkeep of life or endowment policies.<sup>6</sup>

(b) Under the Custodian Order, money due under or in respect of any policy of assurance must be paid to the Custodian.<sup>7</sup>

<sup>1</sup> *Ib.*, at 526. See McNair, 269, that Neville, J.'s statement must be read in the light of the proclamation. McNair points out that if the premium is not lawfully paid or made up, the contract is *terminated*—not suspended—by the operation of its own conditions. If the policy thereupon becomes forfeited, the surrender value should be registered with the Custodian and paid to him (McNair, 271, 272).

<sup>2</sup> See argument for the appellees in *Statham Case*, *infra*, 93 U.S., at 29.

<sup>3</sup> McNair, 264.

<sup>4</sup> Section 1 (2) (a) (ii).

<sup>5</sup> McNair, 269.

<sup>6</sup> McNair, 270.

<sup>7</sup> S.R. & O., 1939, No. 1198, art. 1 (ii) (f).

### 3. *Contract Revives upon Restoration of Peace*

Upon the restoration of peace, subject to the provisions of the Treaty of Peace, the contract of insurance, if it has not become forfeited by operation of its own conditions, will revive upon payment of the premiums due.<sup>1</sup>

### 4. *Quaere, Abrogation ?*

Some authorities hold that a contract of life insurance, involving periodical payments which cannot be made by persons divided by the line of war, are *abrogated* by war, subject to the assured's right to recover the *equitable value* of the policy as from the time of abrogation: *New York Life Insurance Co. v. Statham*.<sup>2</sup>

A contract of life assurance, said Bradley, J., by which an annual premium is payable, is "not an assurance for a single year, with a privilege of renewal from year to year by paying the annual premium, but . . . an entire contract of assurance for life, subject to discontinuance and forfeiture for non-payment of any of the stipulated premiums."<sup>3</sup> Each instalment is *part consideration* of the *entire* insurance. There is no relation between the annual premium and the risk of assurance for the year of payment. The annual premiums are an annuity; "The whole premiums are balanced against the whole insurance."<sup>3</sup> Promptness of payment is essential; forfeiture for non-payment is a necessary means of protection. Time is material: "the forfeiture is absolute if the premium be not paid."<sup>4</sup> The doctrine of suspension does not apply where suspension would be "unjust or inequitable."<sup>5</sup>

"The insured has an equitable right to have the amount (i.e., the premiums already paid) restored to him, subject to a deduction for the value of the assurance enjoyed by him whilst the policy was in existence; in other words, he is fairly entitled to have the equitable value of his policy."<sup>6</sup>

The "equitable value" is the difference between the cost of a new policy and the present value of the premiums yet to be paid on the forfeited policy, when the forfeiture occurred.

Clifford, J., in a dissenting judgment, said:—

"Where the parties to an executory money-contract live in different countries, and the governments of those countries become involved in public war with each other, the contract between such parties is suspended during the existence of the

<sup>1</sup> See *McNair*, 271, 272. Contrast the *Statham Case*, *infra*, at 31, 32.

<sup>2</sup> (1876), 93 U.S. 24, *per* Bradley, J., at 30-36, Clifford and Hunt, JJ., dissenting, holding that the contract was suspended (*ib.*, at 37). This decision was reaffirmed in *Insurance Co. v. Davis* (1877), 95 U.S. 425, 428, *per* Bradley, J. See 2 Pitt Cobbett, 111; Phillipson, 86, 87; the *Stevenson Case* [1918] A.C. 239.

<sup>3</sup> (1876), 93 U.S., at 30. See the discussion in *McNair*, 250.

<sup>4</sup> *Ib.*, at 31.

<sup>5</sup> *Ib.*, at 32.

<sup>6</sup> *Ib.*, at 34.

war, and revives when peace ensures; and that rule, in my judgment, is as applicable to the contract of life insurance as to any other executory contract."<sup>1</sup>

This doctrine of the Supreme Court, it is submitted, is not the law of England. The court would, in effect, be making a new contract for the parties, or, alternatively, would be allowing the recovery of money had and received where the failure of consideration was partial. There is no power to make such equitable apportionment of prepaid moneys.<sup>2</sup>

It is submitted that this dissent and the reasoning of Neville, J., in *Seligman's Case*<sup>3</sup> are to be preferred.

### 5. Under Treaty of Versailles

By the Treaty of Versailles, contracts of life insurance made between an insurer and a person who became an enemy were deemed not to have been dissolved by war.

Any sum due during the war was recoverable after the war with interest at 5 per cent. Where the contract lapsed during the war owing to non-payment of premiums, or became void through breach of conditions, the surrender value of the policy at the date of lapse or avoidance could be claimed from the insurer. When the contract lapsed during the war owing to non-payment of premiums by reason of the line of war, the contract might be restored on payment of the premiums with interest at 5 per cent. within three months after the Treaty came into force.<sup>4</sup>

<sup>1</sup> (1876), 93 U.S., at 37. Hunt, J., concurred.

<sup>2</sup> [1943] A.C. 43, 49, *per* Viscount Simon, L.C., in *The Fibrosa Case*.

<sup>3</sup> *Supra*. Phillipson (85-87) accepts the propositions laid down in *Statham's Case*. So, Campbell (191-218), who carefully analyses the various streams of American authorities arising out of the Civil War, and concludes (214, 215) that upon failure to pay the premiums at the stipulated times the policy is avoided. Thus, Williston, s. 1748; *Restatement*, s. 596.

<sup>4</sup> Section V, Annex II, para. 11; see Picciotto & Wort, 50, 51, 52, 53. See also Macgillivray, *op. cit.*, 291, and at 292 for the operation of the stipulations in the several treaties concerning the settlement of "enemy debts" and the charging of all property, rights and interests in the United Kingdom, belonging to ex-enemy nationals at the date of ratification, with payment of the war claims of British nationals. Claims on matured policies were collected by the Controller of the British Clearing Office and the proceeds applied in satisfaction of the established claims of British creditors against ex-enemy debtors. The rights and interests of enemy nationals in policies which had not matured were vested in the Custodian for liquidation and the proceeds were applied to satisfy British claims for compensation in respect of war measures taken against British property in the enemy country.

It has been questioned whether, under an ordinary life policy (in the usual form), there is any "right or interest" which could be vested in the Custodian except the right to pay the annual premium and thus to maintain the policy. The "surrender value" is not vested, for normally policies do not include a contractual right on the part of the insured to take the surrender value.

## CHAPTER XII

### AFFREIGHTMENT

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#### A. ON ORDINARY CARGOES

##### 1. *When Contract Abrogated*

(a) A contract of affreightment, whether in the form of a bill of lading, or a voyage charterparty, or a time charterparty, when one party becomes an *alien enemy*, is abrogated.<sup>1</sup>

The contract is discharged because it belongs to—

“trading contracts as such, which are in being as mutually executory contracts at the outbreak of war, and would in ordinary course and circumstances import commercial intercourse.”<sup>2</sup>

In *Esposito v. Bowden*,<sup>3</sup> Willes, J., declared that an executory contract of affreightment is in such circumstances dissolved and that both parties are absolved from further performance.

(b) A contract of affreightment is abrogated when, upon a state of war, it becomes illegal for one of the parties to call *at a specified port*: *Esposito v. Bowden*.<sup>3</sup>

A British charterer, who had agreed to load a cargo at Odessa which, upon the outbreak of the Crimean War, became a hostile port, was discharged from his obligation.

<sup>1</sup> Scrutton, art. 4.

<sup>2</sup> The *Ertel Bieber Case* [1918] A.C. 280, 289, per Lord Sumner.

<sup>3</sup> (1857), 7 El. & Bl. 763, 783, 793; *supra*, 189, 190.

"For a British subject," said Willes, J., "(not domiciled in a neutral country . . .), to ship a cargo from an enemy's port, even in a neutral vessel without licence, is an act *prima facie*, and under all ordinary circumstances, a dealing or trading with the enemy, and therefore forbidden by law."

(c) A contract of affreightment may become illegal *upon the declaration of war*, even though the vessel has been lying in port ready for cargo and the lay days have not expired: *Avery v. Bowden*.<sup>1</sup>

The same principle applies where war breaks out without a previous declaration of war.<sup>2</sup>

If the goods have already been loaded and the voyage has not yet begun, the merchant must unload his goods in a case where commerce is prohibited between the country of the ship or cargo and the country of their destination.<sup>3</sup>

(d) Where the charterers are agents for alien enemies, the charterparty is dissolved by the outbreak of war: *Clapham Steamship Case*.<sup>4</sup>

In 1913 a Dutch company, managed by Germans resident in Holland under the supervision of a committee of Germans resident in Germany, chartered *The Fengarth* for five years. The charterparty gave the charterers or owners the option of suspending the charter during war. On the outbreak of war the Dutch company gave notice of suspension. The British shipowners claimed that the charterparty was dissolved.

The charterparty, said Rowlatt, J., was for the benefit of the enemy; the outbreak of war made it illegal *in toto*: otherwise the ship would be withdrawn for the duration of the war and the benefit of her services would, at its conclusion, be assured to the enemy.

"If at the moment when war breaks out the enemy is entitled to retain his assurance of tonnage to be available at the end of the war his commercial position is fortified even during the war. He is enabled, by the prospect of shipping facilities which he has, to keep together his connection with neutral or enemy merchants overseas, and even (if he likes to speculate on the war being short, or if he can obtain contracts with conditions protecting him if it should be long) to enter

<sup>1</sup> (1856), 6 El. & Bl. 953, 972, *per* Pollock, C.B.

<sup>2</sup> See *per* Sir Wilfrid Greene, M.R., in *The Kawasaki Case* [1939] 2 K.B. 544, 556.

<sup>3</sup> Carver, s. 238, citing *The Hoop* (1799) 1 C. Rob. 196, 216, and Abbott, *Shipping*, 5th ed., 427; 13th ed., 754. He cites the following from the judgment of Scrutton, J., in *Karberg & Co. v. Blythe, Green, Jourdain & Co.* [1915] 2 K.B. 379, 390: "I think the same principles must apply if the war is between the country of the shipowner and the country of the cargo-owner or charterer." But see *McNair*, 194, 195.

<sup>4</sup> [1917] 2 K.B. 639, 645, 646. See *McNair*, 197.

*de praesenti* into new contracts to be performed when peace arrives. His ability to do these things at least helps to drive his adversary to the necessity of a long war.”

## 2. No Action for Unlawful Freight

No action will be entertained to recover freight earned in the carriage of cargo, which involves trading with the enemy: *Muller v. Gernon*.<sup>1</sup>

A Secretary of State, the Treasury and the Board of Trade have power to give a general or special authority to do any act which would otherwise be regarded as trading with the enemy.<sup>2</sup>

By a *General Licence*, issued by the Board of Trade,<sup>3</sup> the London Chamber of Commerce was authorised to pay to or for the benefit of any enemy, on behalf of the owner of any cargo in a ship lying at a port in any country not being enemy territory, for obtaining possession of that cargo, the following:—

(a) where freight has not been paid, an amount not exceeding the full freight which, but for the outbreak of war, would have been payable on completion of the voyage, and

(b) in any case, such other amount as the Chamber may deem necessary not exceeding 5 per cent. of the original c.i.f. invoice value of the cargo.

## 3. Temporary Embargo

During an embargo a contract of affreightment, it has been held, is suspended; when the embargo is lifted the contract revives: *Hadley v. Clarke*.<sup>4</sup> The decision has been severely criticised and must be regarded as doubtful.

“An embargo . . . was only a temporary restraint, and prevented the ship’s performing the voyage at that time; but still the defendants were bound to comply with the terms of the contract as soon as they reasonably could; even if we consider the embargo to have the same effect as an Act of Parliament, still it would only create a temporary restraint, until such time as the King in Council should take off the embargo. Such an Act of Parliament would not dissolve, it would only suspend the execution of, the contract; and the embargo cannot have a greater effect.”

The goods were shipped at Liverpool for Leghorn and sailed to Falmouth to join a convoy. On arriving there in June, 1796,

<sup>1</sup> (1811), 3 Taunt. 393, 394.

<sup>2</sup> Trading with the Enemy Act, 1939, s. 1 (2), proviso (i), *supra*, 149–151.

<sup>3</sup> Trading with the Enemy (Freights) General Licence, dated 11th April, 1940 (S.R. & O., 1940, No. 482).

<sup>4</sup> (1799), 8 Term Rep. 259, 266, 267, *per* Grose, J.; Carver, s. 242. In *Metropolitan Water Board v. Dick, Kerr & Co.* [1918] A.C. 119, 127, Lord Finlay, L.C., says that *Hadley v. Clarke* “cannot be relied upon as an authority.” See Scrutton, 112, note (h), stating that *Hadley v. Clarke* “must be treated as wrongly decided on the facts, if not on the law.”

an embargo was laid, by Order in Council, on all ships proceeding to Leghorn. The ship remained at Falmouth until August, 1798, whereupon she returned to Liverpool and re-landed the cargo. The embargo was removed in October, 1798. The shipowner was held liable for not performing his contract; he had *absolutely* engaged himself to carry the goods, "the dangers of the seas only excepted," that therefore is the only excuse which they can make for not performing the contract."<sup>1</sup>

#### 4. Indefinite Embargo or Blockade

A contract of affreightment will be dissolved if the embargo is so long or of such a nature as to frustrate the commercial adventure: *Geipel v. Smith*.<sup>2</sup>

British shipowners agreed to load a cargo of coal at a port, and to proceed to Hamburg as soon as wind and weather would permit, and there deliver the coal; "restraints of princes and rulers excepted." After the charterparty was made, war broke out between France and Germany, and the French Government declared Hamburg blockaded. England remained neutral. The shipowners refused to take a cargo on their British ship. Except by running the blockade, the charterparty could not have been carried out within a reasonable time. The shipowners were justified in refusing to load when further performance of the contract within a reasonable time was prevented by restraint of princes.

"The effect of such a state of things as an effective blockade," said Blackburn, J., "is not merely to excuse delay in the carrying out of the contract, but that, after a reasonable time, it relieves the parties, the contract being altogether executory, from the performance of it."<sup>3</sup>

It would be "monstrous" that the goods owner must keep his cargo on board until all "commercial profit" would be at an end. An "equal hardship" would fall upon the shipowner if he were bound to keep his ship in dock until it rotted:—

"The object of each of them," Blackburn, J., continued, "was the carrying out of a commercial speculation within a reasonable time; and if restraint of princes intervened and lasted so long as to make this impossible, each had a right to say, 'Our contract cannot be carried out'; and, therefore,

<sup>1</sup> (1799), 8 Term Rep., per Lawrence, J., at 267. Contrast *Horlock v. Beal* [1916] 1 A.C. 486, where the contract was *conditional* and the adventure was *frustrated*. See Lord Atkinson's explanation: *ib.*, 505-506.

<sup>2</sup> (1872), L.R. 7 Q.B. 404; Carver, s. 233; *infra*. See, on *Blockade*, Oppenheim II, 625-647; Higgins & Colombos, 517-553.

<sup>3</sup> (1872), L.R. 7 Q.B., at 412. A contract with the object of running a blockade is not illegal, but is enforceable in our courts: Carver, s. 246, citing the judgment of Dr. Lushington in *The Helen* (1865), L.R. 1 A. & E. 1, 7; Scrutton, art. 5.

the shipowner has a right to sail away, and the charterer to sell his cargo or refrain from procuring one, and treat the contract as at an end."<sup>1</sup>

Lush, J., thought that the plea of blockade was also valid:—

"A state of war must be presumed to be likely to continue so long, and so to disturb the commerce of merchants, as to defeat and destroy the object of a commercial venture like this."<sup>2</sup>

### 5. Discharge at Intermediate Port

Where a British shipowner, under contract to carry goods to an enemy port, diverts his vessel to a British port upon the outbreak of war, he is not entitled to freight, either in whole, since he has not completed the voyage, or in part, and no new contract to give and take delivery at the British port can be inferred: *St. Enoch Shipping Co. v. Phosphate Co.*<sup>3</sup>

"Freight," said Rowlatt, J., "is a sum to be paid on completion of the transit on which it is charged. If the transit is not completed, *prima facie* the freight never becomes payable . . .

There can be no freight *pro rata* unless there is a new contract, express or implied, to substitute the carriage which has been effected for the carriage originally contracted for."

### 6. Master Dispossessed by Enemy

Where a British ship is attacked by submarine, and the master and crew are compelled to abandon the ship, the indorsee of the bill of lading, who elects to take possession of the cargo where the ship lies, is not entitled to the cargo free of freight: *Bradley v. H. Newsom, Sons & Co.*<sup>4</sup>

<sup>1</sup> (1872), L.R. 7 Q.B., at 413.

<sup>2</sup> *Ib.*, at 414, 415. Lord Wright, in *Denny, Mott & Dickson v. Fraser & Co.* [1944] A.C. 265, 278, regards this principle as the "true basis" of frustration. See *The Styria* (1901), 186 U.S. 1, 14, 15 (citing *Geipel v. Smith*). An Austrian steamship, sailing from Trieste via Sicilian ports to New York, took on board at Port Empedocle, Sicily, sulphur for New York. Before sailing, the master heard that war between Spain and the United States had broken out: sulphur being contraband, he had it unloaded and warehoused at Port Empedocle before sailing. The court held that he was justified in so doing.

This case was followed in *The Kronprinzessin Cecilie* (1916), 244 U.S. 12, 23, 24, *per Holmes, J.*, *infra*, 288, note 1.

And see *Allanwilde Transport Corporation v. Vacuum Oil Co.* (1918), 248 U.S. 377, 386, *per McKenna, J.* A vessel was delayed by a storm requiring her return for repairs and then indefinitely by an embargo on clearance to sailing vessels destined for the war zone. The carrier was relieved of the obligation to carry: the embargo was indefinite, presumably for the duration of the war: "The condition was, therefore, so far permanent as naturally and justifiably to determine business judgment and action depending upon it."

<sup>3</sup> [1916] 2 K.B. 624, 626, 627; Scrutton, art. 143.

<sup>4</sup> [1919] A.C. 16, reversing the Court of Appeal [1918] 1 K.B. 271 (Pickford and Bankes, L.J.J., Sargant, J., dissenting), who had affirmed, on different grounds, the decision in [1917] 2 K.B. 112, 116. See Scrutton, art. 143, note (i), who preferred the dissentient judgment of Lord Sumner.



The ship, on a voyage from Archangel to Hull with a wood cargo, was attacked by submarine, and master and crew were compelled to leave. The enemy unsuccessfully attempted to sink the ship; she was found, water-logged, and brought with cargo to Scotland, and there taken possession of by the receiver of wreck. The master had telegraphed that the ship had been sunk (as he believed); the owners wrote to the ships' agents a letter for advising the cargo owners. Hearing that the ship was afloat, indorsees of the bill of lading intervened and intimated to the receiver that they elected to take possession of the wreck where she lay. They claimed delivery free of freight on the ground that the voyage had been abandoned.

The House of Lords (Lord Sumner dissenting) held that there had been no abandonment without intention of return and without hope of recovery so as to entitle the cargo owners to treat the contract as at an end.

"The fact of having been forced away from here is one thing. An intention to leave her derelict is quite a different thing. They did not leave the vessel. It was really taken from them."<sup>1</sup>

If the owner voluntarily abandons a ship, it is for him to prove his intention to return. If he is "compulsorily dispossessed," the contract is unaffected unless by word or deed he shows an intention not to seek to regain possession.<sup>2</sup>

Lord Sumner dissented. He cites Carver:—

"Where a ship has been definitely abandoned at sea by the master and crew, without any intention of coming back to her, . . . the freighter is entitled to treat the contract of carriage as abandoned. So that if the ship, or the cargo, be afterwards brought into court by salvors, the cargo owners may claim to have their goods, without paying any freight; even though the shipowner is ready and demands to be allowed to take them on to their destination."<sup>3</sup>

He refers to the English decisions to this effect, which have been followed by the Supreme Court of the United States in *The Eliza Lines*.<sup>4</sup> The shipowner has a possessory lien on goods

<sup>1</sup> [1919] A.C., at 32, *per* Viscount Haldane.

<sup>2</sup> *Ib.*, at 57, *per* Lord Wrenbury, whose incisive reasoning upon the ways in which a contract may be determined (51, 52), and upon anticipatory breach (53, 64) deserves study. Abandonment at sea does not in itself end the contract of affreightment (at 54). *Dispossession* is not abandonment (at 57).

<sup>3</sup> Section 555, citing *The Arno* (1895), 72 L.T. 621; *The Cito* (1881), 51 L.J. Adm. 1; *The Kathleen* (1874), 43 L.J. Adm. 39.

<sup>4</sup> (1906), 199 U.S. 119. A vessel, justifiably abandoned through dangers of the seas, was picked up by salvors. The master claimed the vessel and cargo from the salvors, stating that he intended to repair the vessel and complete the voyage. The cargo owners objected, claiming that the voyage was abandoned and that they were entitled to the cargo. The Supreme Court held (Holmes, J., delivering the opinion of the court and four justices dissenting) that abandonment gave the

shipped for the freight. If he loses possession, "what term in the bill of lading contract prevents the cargo owner from taking possession of his own property, or constrains him to ship it out again or to redeliver it to the shipowner for his benefit?"<sup>1</sup> If a ship and cargo are left derelict at sea the shipowner loses possession and his possessory lien. In such a case the salvors who first take possession, acquire a maritime lien on the ship for salvage services, and have the absolute possession and control of the vessel.<sup>2</sup>

Sankey, J., Pickford, L.J., and Evans, P. (in the salvage action), found that the ship and cargo were left derelict, and Lord Sumner agreed. Upon the evidence, said Lord Sumner, the master gave orders to take to the boats; he decided, though under duress: "His act was neither unintentional nor involuntary."<sup>3</sup> He believed, though wrongly, that his ship had sunk; but this does not prevent his action from being "voluntary, deliberate and unconstrained."

Lord Sumner concludes:—

"The fact that the captain and crew had little choice here and virtually had to leave their ship to save their lives is an ordinary incident of derelicts. Whether this is caused by fire or by the King's enemies or by perils of the sea cannot distinguish the cases from one another. They have to leave the ship, and they go, and the ship is left derelict; and the clearer the compulsion the clearer is the termination of the voyage, unless special circumstances show a *spes*, not a speculation, *revertendi*, a plan, not a bare possibility, of leaving the ship the better to procure help and to continue the voyage."<sup>4</sup>

### 7. Reasonable Deviation

Where the master of a ship reasonably believes that if he

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cargo owners the right to refuse to go on with the voyage. "Repudiation of a contract entitles the other party to refuse to proceed. Abandonment of a ship is a renunciation of the contract; it practically destroys the value of the contract to the cargo owner" (at 129).

"By the general principles of contract an open cessation of performance with the intent to do no more, even if justified, excuses the other party from further performance on his side" (at 129, cited by Lord Sumner).

Completion of the voyage is "an absolute condition" to the right of freight; it is equally absolute that "the effort to complete the voyage shall not be given up voluntarily, midway" (at 131).

The dissenting judges thought that compulsory abandonment should be treated merely as a present relinquishment of the voyage, but that, upon rescue, the master may resume possession of the ship, subject to the claim of salvors if he acts promptly and before any intervening rights have accrued (at 140).

<sup>1</sup> [1919] A.C., at 41.

<sup>2</sup> Cited *ib.*, from *Cosman v. West*, 13 A.C. 181.

<sup>3</sup> *Ib.*, at 43. See *The Janet Court* [1897] P. 59; *McNair*, 202.

<sup>4</sup> *Ib.*, at 46, 47.

prosecutes the direct course of his voyage he will be exposed to imminent peril, he may make a reasonable deviation ; and if he delivers his cargo at a port within the terms of the charterparty, he will be entitled to freight : *The Teutonia*.<sup>1</sup>

The master of a Russian vessel, carrying contraband<sup>2</sup> from Pisagua to a safe port in Great Britain or on the Continent between Havre and Hamburg, arrived at Falmouth and received orders to proceed to Dunkirk and there to deliver. On arrival at Dunkirk, he was informed that war had broken out between France and Prussia ; he put back to the Downs to make inquiries. Instructed by the owner not to go to Dunkirk, on the next day he put into Dover, where he was informed that war had been declared. For nine days war had been imminent ; the master could have delivered the cargo at Dunkirk, when originally instructed. He was justified in deviating to make further inquiries ; since the delivery at Dover was within the terms of the charterparty, he was entitled to freight. The consignee had accepted delivery at the nearest alternative port ; for freight to that port he was liable.<sup>3</sup>

"The true test seems to be," said Lord Atkin in a modern case, "what departure from the contract voyage might a prudent person controlling the voyage at the time make and maintain, having in mind all the relevant circumstances existing at the time, including the terms of the contract, and

<sup>1</sup> (1872), L.R. 4 P.C. 171 ; see Scrutton, 319, note (c) and art. 139.

See *The Kronprinzessin Cecilie* (1916), 244 U.S. 12 (quoting *The Teutonia*). A German steamship sailed from the United States for Bremerhaven, on 28th July, carrying gold and having on board 1,800 persons, of whom 1,173 were Germans and Austrians. On 31st July she turned back : the master knew of the imminence of war between England and Germany. He reached Maine on 4th August and returned the gold to the parties entitled to it. The Supreme Court held that the master was justified in apprehending that if she continued her voyage, she would be seized as prize and her passengers detained : he was entitled to return. *Peril of capture* is an implied exception in the bill of lading (*ib.*, at 22). Moreover, the master was at liberty to anticipate war. He is "not to be put in the wrong by nice calculations that if all went well he might have delivered the gold and escaped capture by the margin of a few hours."

<sup>2</sup> Upon carriage of contraband, see Carver, ss. 244, 245, 246 ; Higgins and Colombos, 482-503. For the British Proclamations, 1939-41, *op. cit.*, 494 *et seq.* Upon carriage of contraband on neutral ships, *op. cit.*, 500-502. And see Erle Richards, *Contraband*, B.Y.I.L., 1922-23, 1-16 ; S. W. D. Rowson, in 61 L.Q.R. 41-70, at 54-57.

<sup>3</sup> See the exposition of this case by Rowlatt, J., in the *St. Enoch Shipping Co., Ltd.'s Case* [1916] 2 K.B. 624, 626, 627, where no alternative port was named and the shipowners were not entitled to freight where the cargo owners had not assented to an alteration of the contract. See also Carver, 8th ed., ss. 240, 51. On the interpretation of "reasonable deviation" (the term used in art. IV, r. 4, of the *Rules Relating to Bills of Lading*, in the Schedule to the Carriage of Goods by Sea Act, 1924 (Carver, 1027)), see Carver, s. 292b. Upon the *Master's Authority to delay and deviate in cases of necessity*, see Scrutton, art. 100, and at 319, 320.

the interests of all parties concerned, but without obligation to consider the interests of anyone as conclusive."<sup>1</sup>

## B. ON PRIZE CARGOES

### 1. *No Freight on Prize Cargo*

"When, during a war, a voyage of a neutral or British ship is interrupted by the seizure by a belligerent of a cargo, the adventure is at an end, and the shipowner is not by law entitled to the payment of freight."<sup>2</sup>

### 2. *Compensation in Lieu*

Where the cargo has come within the jurisdiction of the British or American Prize Courts, "a sum in respect of freight may be awarded to shipowners for the carriage of condemned or released cargo." This is a matter of discretion, and is based on considerations of "recognised justice and fair dealing."

In *The Prins der Nederlanden*,<sup>3</sup> Lord Sumner said:

"... when freight is allowed, it is from the court's view of fair dealing towards parties whose conduct is open to blame, and it is refused in order to protect the effectual exercise of belligerent rights. Reasons of this kind seem founded rather in policy and discretion than in legal rule and legal right... the theory of it must be that the court, endeavouring to hold an even balance between belligerent rights and the rights of neutral trade, requires that the captor's windfall shall suffer some abatement under circumstances of legitimate carriage, and will only adjudge the *res* in its hands to those who, in placing it there, have submitted to its jurisdiction, after fair consideration for those who lose by mere misfortune and without fault. Now a jurisdiction to do what is fair in the circumstances of a given case is essentially a jurisdiction which is discretionary in its exercise... it is still open to the court to make a discretionary allowance when circumstances are wholly exceptional."

### 3. *Pro rata Freight*

"Such an amount of freight should be awarded to a shipowner as represents the value of his services."<sup>4</sup>

<sup>1</sup> *Stag Line, Ltd. v. Foscolo, Mango & Co.* [1932] A.C. 328, 343, 344. See Carver, ss. 11, 82. And see the definition of "apprehension of capture" accepted by Sir Montague E. Smith in *Anderson v. The San Roman* (1873), L.R. 5 P.C. 305.

<sup>2</sup> E. S. Roscoe, *Right to Freight on Prize Cargoes in Time of War* (1922), 38 L.Q.R. 350-358, at 350, 351. See *The Diana* (1803), 5 C. Rob. 67, 71, 72, judgment of Sir W. Scott, stating two general rules relating to the recovery of freight in the Prize Court: "The first is, that if goods are not carried to their original destination, within the intention of the contracting parties, freight *shall* not be due. The other rule equally general is, that when the contract is executed by bringing the cargo to the place of destination, the captor to whom the vessel is condemned *shall* be entitled to the freight which has been earned."

<sup>3</sup> [1921] 1 A.C. 754, 760, 761, 762; Roscoe. *loc. cit.*

<sup>4</sup> Roscoe, *op. cit.*, 352.

This is not the contractual amount, but the whole or part, according to circumstances.<sup>1</sup> It is not freight, but "compensation in lieu of freight."<sup>2</sup>

(a) *Unlawful seizure of neutral ship*

"Compensation in lieu of freight," said Lord Parker,<sup>3</sup> "may well be awarded against the captors where, by reason of a seizure *jure belli* which turns out to be unlawful, the ship has been deprived of the opportunity of earning freight which but for such seizure it could lawfully have earned."

(b) *Lawful seizure of enemy goods*

"Where enemy goods on board either a neutral or British ship are lawfully seized as prize the ship may be entitled to compensation in lieu of freight. In such a case the captors are the gainers from the fact that the ship has brought the goods to the place of seizure."<sup>3</sup>

In assessing compensation, the course and duration of the voyage must be regarded, but it is not a question of a "mere arithmetical calculation of distances or times."

"Such a sum is to be allowed for freight," said Sir Samuel Evans, P., "as is fair and reasonable in all the circumstances, regard being had to the rate of freight originally agreed (although this is not necessarily conclusive in all cases), to the extent to which the voyage has been made, to the labour and cost expended, or any special charges incurred in respect of the cargo seized before its seizure and unloading, and to the benefit accruing to the cargo from the carriage on the voyage up to the seizure and unloading; but no sum is to be allowed in respect of any inconveniences or delay attributable to the state of war or to the consequent detention and seizure."<sup>4</sup>

<sup>1</sup> But see Roscoe, *op cit*, at 352, 353, citing the view of Sir W. Scott in *The Copenhagen* (1799), 1 C. Rob. 289, 291, that in prize the full freight should always be given.

"As the captor by his act of seizure has prevented its completion (i.e., the completion of the voyage), his seizure shall operate to the same effect as an actual delivery of the goods to the consignee, and shall subject him to the payment of the full freight." This view was not followed during the War of 1914-18.

<sup>2</sup> Roscoe, *op. cit.*, 354. The term is used by Lord Parker of Waddington in *The St. Helena* [1916] 2 A.C. 625, 629, 630: "As a matter of contract no freight was payable. Under the contract between the parties nothing could become due for freight until the ship performed her part of the bargain by carrying the goods to their port of decision. In order to succeed, therefore, the respondents had to establish that, according to the law administered in a Court of Prize, they were entitled to some compensation in lieu of freight." See also *per* Lord Sumner, in [1921] 1 A.C. 758, 759.

<sup>3</sup> [1916] 2 A.C., at 630.

<sup>4</sup> *The Juno* [1916] P. 169, 175. See the illustrations given where full freight might, or might not, be payable, respectively. Freight was allowed where enemy cargo, proceeding on a British vessel to a neutral port, had been seized and

#### 4. Where Voyage Unlawful

Where, upon the outbreak of war, a British ship has abandoned a voyage to Germany, no compensation is payable in respect of cargo seized at an English port after the abandonment of the voyage: *The St. Helena*.<sup>1</sup>

"Where prior to the seizure the voyage has become unlawful and all possibility of earning the freight has been already lost, there appears . . . to be nothing for which compensation can properly be awarded. It is no part of the function of the Prize Court to alter the contractual relations between shipowner and cargo owner, and this would be the only result of allowing such compensation."

#### 5. Where Goods Contraband

(a) *No compensation* is generally allowed where goods are condemned because they are contraband; but the Prize Court may, in its discretion, "where circumstances are wholly exceptional," award compensation.<sup>2</sup>

The allowance of freight for the carriage of contraband is very rare: before 1921 only two such cases were reported.<sup>3</sup>

(b) *The theory* upon which it is allowed, says Lord Sumner, is "not very consistent or logical."<sup>4</sup> When it is done *at the expense of the captors*, it is not upon the footing of a prior and legally binding objection: there is no promise to pay, express or implied. Captors act "wholly *ex adverso*" towards the carrier, in exercise of "superior belligerent rights." They determine the carrier's lien; a decree of condemnation involves the frustration of the voyage. *The carrier's contract* with the shippers subsists or is determined by his inability to carry and deliver; against the successful captor he has no legal rights.<sup>4</sup> If the prize were condemned "freight free," the captor would be getting something for nothing. If the theory rests on the view that the captor is getting something of value from the carrier, what distinction is there, Lord Sumner asks, between cases of contraband, where freight is refused, and cases of

condemned at a British port. The actual decision, says Mr. Roscoe, is probably wrong, because there was no stoppage by seizure; but the rule of *pro rata* freight, as stated by the President, is, nevertheless, authoritative (Roscoe, *op. cit.*, 355, 356). The rule in *The Juno* has been followed by Lord Merriman, P., in *The Glenearn* (No. 2) [1942] P. 50, 58, 59, and in *The Panaghiotis* [1943] P. 4, *infra*.

<sup>1</sup> [1916] 2 A.C. 625-630, *per* Lord Parker.

<sup>2</sup> Roscoe, *op. cit.*, 356-358; *The Prins der Nederlanden* [1921] 1 A.C. 753, 757.

<sup>3</sup> [1921] 1 A.C. 756, 757, *per* Lord Sumner. For the general principle, *The Christina* (1790), 1 C. Rob. 236, 242, and Sir W. Scott are cited (at 757)—"withholding, as usual, on the carriage of contraband, the allowance of freight and expenses"; for the exception, *The Neptunus* (1798), 3 C. Rob. 108, 109.

<sup>4</sup> *Ib.*, 758. "Capture as prize of war," *jure belli*, overrides all previous liens; cited from *The Batlle* (1867), 6 Wall 498, *per* Nelson J., by Lord Wright in *France Fenwick Tyne & Wear Co. v. H.M. Procurator-General* [1942] A.C. 667, 677.

capture of non-contraband, where it is allowed?<sup>1</sup> He concludes that the rule allowing freight is *founded on policy, rather than on legal right*; it is granted from the court's view of fair dealing; it is refused "to protect the effectual exercise of belligerent rights."<sup>2</sup>

(c) The Judicial Committee of the Privy Council *declined to indicate what circumstances* would justify an allowance of freight on a contraband cargo. The question, being "*essentially one of discretion*," should be decided by the judge of the Prize Court on the facts before him.<sup>3</sup> The function of the jurisdiction is—

"to secure to neutrals in suitable cases a return for work done in the way of their trade and without circumstances of disregard of neutral obligations in the course of it."<sup>4</sup>

Lord Wright, in a recent decision, observes:—

"It may be that the true reason for the allowance of freight was not so much the technical reason that the owner had a right of possession as a sense of fairness and equity."<sup>5</sup>

*Ignorance* of neutral shipowners as to the enemy destination of the contraband goods<sup>6</sup>; their *conduct* in informing British authorities of the proposed shipment; and their *meritorious services* in carrying the goods from Las Palmas, were *not sufficient grounds*, either singly, or in combination, for exercising this discretion of awarding compensation in lieu of freight.

#### 6. Recent Decisions on Compensation

(a) In *The "Jurko Topie"*,<sup>7</sup> the owners of the steamship, a Yugoslav corporation, claimed (*inter alia*) freight, compensation and damages for the seizure and detention of the vessel.

On 26th August, 1939, the ship sailed from Yugoslavia with a cargo of bauxite, consigned to optional ports. The option was exercised for Emden. By a proclamation made on 3rd September, 1939, bauxite was declared absolute contraband. Notice of detention was served on the master at Gibraltar and a writ for seizure was issued by the Crown Agent in the Gibraltar Prize Court; the proceedings were later remitted to the Admiralty Registrar in England. After the ship had arrived in England, the Deputy Marshal of the Prize Court sold the cargo. She could not complete her discharge for several weeks and undue delay was alleged. In June, 1940, the proceeds of the cargo were condemned as prize.

<sup>1</sup> [1921] 1 A.C., 759.

<sup>2</sup> *Ib.*, 760.

<sup>3</sup> *Ib.*, 763, 764.

<sup>4</sup> *Ib.*, 762.

<sup>5</sup> In *France Fenwick Tyne & Wear Co. v. H.M. Procurator-General* [1942] A.C. 667, 685. He applies Lord Sumner's reasoning in *The Prins der Nederlanden* to a claim for civil salvage services rendered to a vessel before her seizure in prize.

<sup>6</sup> [1921] 1 A.C. 763. Roscoe severely criticises this proposition (*op. cit.*, 357).

<sup>7</sup> [1941], 1 Ll. P.C. (2nd) 39.

The Attorney-General contended that a contraband cargo carried no right to freight; to obtain the exercise of the court's discretion the owner must show that at seizure the ship did not know that war had broken out, or, alternatively, that she had taken steps to discontinue the voyage. For the shipowners it was submitted that an innocent neutral ship with cargo should not be detained without compensation, in order that the captors could transfer the cargo for their own convenience and in order to obtain a better price. They claimed full freight.

Lord Merriman, P., said that from 3rd September the ship ceased to be a free agent; neither the master nor the owners could have been aware of the proclamation; they had done nothing to forfeit such compensation in lieu of freight as might be awarded to an innocent ship. It was "a clear case" for compensation in lieu of freight; full freight, it was not disputed, was, in this case, the proper measure.<sup>1</sup>

(b) *Freight on individual consignments, not profit out of the freight, is the basis of compensation: The Glenearn (No. 2).*<sup>2</sup>

Before the war, a British steamship, loaded a mixed cargo at China and Japan for London and Hamburg. Under the bills of lading the owners were entitled, in the imminence of war, to abandon the voyage, and freight, if not prepaid, would be payable in proportion to the carriage. On 23rd August, 1939, the ship reached London and the owners decided to abandon the voyage to Hamburg and to discharge the Hamburg cargo in London. On 9th October, the Hamburg cargo, including five parcels, was seized as prize. The claim on one parcel stood over; the claim on the other was withdrawn. Freight on the three parcels, covered by separate bills of lading, was £150.

A claim for compensation in lieu of freight was rejected by the Registrar: the claimants were financially better off than if the voyage had run its normal course.

"I think that it is implicit in the very nature of the claim," said Lord Merriman, P.,

"that it is the freight itself and not any profit to be made out of the freight which is primarily the basis of the compensation, and it would be manifestly impossible to award the whole freight on any other basis."<sup>3</sup>

The references in *The Juno*<sup>4</sup> to "cargo," "voyage," and "freight" were to be read "distributively, in relation to each parcel condemned."<sup>5</sup> Where the shipowner's merits are "unimpeachable," a particular parcel has been seized and condemned, and the shipowner cannot recover full freight, while the Crown gets the benefit of carriage, compensation, not

<sup>1</sup> (1941), 1 Ll. P.C. (2nd), 93, 94.

<sup>2</sup> [1942] P. 50.

<sup>3</sup> [1942] P. 58, *per* Lord Merriman, P. <sup>4</sup> [1916] P. 175.

<sup>5</sup> [1942] P. 59. Lord Merriman refers to Scrutton, art. 1.



exceeding the 'full freight, should be computed according to the rule in *The Juno*.<sup>1</sup> The sum of £144 was awarded, based on the mileage from the port of loading to London, as compared with the mileage to Hamburg.

(c) In the absence of wrongful or oppressive conduct on the part of the Crown, *the shipowners are not entitled to costs of proving a claim for compensation in lieu of freight: The Panaghiotis*.<sup>2</sup>

The claimants owned a Greek steamship. At the outbreak of war she was carrying iron ore for Germany, which was seized and condemned. The Registrar awarded compensation in lieu of freight—a sum greater than the Crown had offered, but less than the amount claimed. He awarded costs to the claimants.

The Crown moved, objecting that in prize cases the Crown is not ordered to pay costs unless guilty of negligence or some wrongful conduct.<sup>3</sup> Lord Merriman, P., upheld the objection.

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<sup>1</sup> [1942] P. 59. Lord Merriman refers to Scrutton, art. 1.

<sup>2</sup> [1943] P. 4.

<sup>3</sup> *The Falk* [1921] 1 A.C. 787, 798, *per* Lord Sumner.

## CHAPTER XIII

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### I. WAR RISKS INSURANCE ACT, 1939

THE objects of the War Risks Insurance Act, 1939,<sup>1</sup> are

"To make provision for authorising the Board of Trade, in the event of war and in other circumstances, to undertake the insurance of ships and other goods ; for the payment by the Board of Trade, in time of war, of compensation in respect of goods lost or damaged in transit ; for requiring persons to insure goods against certain risks in time of war . . ."

Part I deals with the insurance of *ships and cargoes* ; Part II, with the insurance of *goods in the United Kingdom*.<sup>2</sup>

#### A. INSURANCE OF SHIPS AND CARGOES

##### 1. *Reinsurance by Board of Trade of Ships and Cargoes*

The Board of Trade—whose functions under Part I are now exercisable by the Minister of War Transport<sup>3</sup>—has power,

<sup>1</sup> Enacted 4th August, 1939. The quotation is from the preamble.

<sup>2</sup> The Act has been amended by The Defence (War Risks Insurance) Regulations, 1940 (S.R. & O., 1940, No. 771) ; (No. 2), 1940 (S.R. & O., 1940, No. 1142) ; (No. 3), 1940 (S.R. & O., 1940, No. 3, 1288) ; (No. 4), 1940 (S.R. & O., 1940, No. 1616) ; and by Part III of the War Damage Act, 1941, now the Act of 1943.

<sup>3</sup> S.R. & O., 1939, No. 1470, and S.R. & O., 1941, No. 654.

with the approval of the Treasury, to enter into agreement for *reinsurance by the Board*<sup>1</sup> of any *war risks* against which (a) a British ship, or (b) the cargo carried on a ship or aircraft, is insured. "War risks"—under this section—will have the meaning assigned to the term in each such agreement.<sup>2</sup>

(a) *The Agreement* between the *Britannic Steamship Insurance Association, Ltd.*, and the *Minister of War Transport*, for *Reinsurance of British Ships* (1943)<sup>3</sup>—taking effect from 21st November, 1942<sup>4</sup>—consolidates and amends "the principal Agreement"<sup>5</sup> as modified. *Similar Agreements* were made on the same date with other *War Risk Associations*.<sup>6</sup>

The Minister insures, as reinsurer of the Association, any vessel insured by the Association against *King's Enemy Risks*, on the following terms:—

(i) the *original insurance* must be in the terms of the policy in the First Schedule (*War-Time Original Policy for Time*);

(ii) the *reinsurance* must be in the terms of the policy in the Second Schedule.

The Minister fixes rates of premium and the reinsurance will generally cover 80 per cent. of the insurer's liability.<sup>7</sup>

*Requisitioned vessels* (except those running while requisitioned under charterparties where the Crown bears all risk) will be reinsured against *war risks generally* and include *additional cover* towards the owner's liability for a *contribution in general average or salvage* arising out of a war risk on the net hire.<sup>8</sup>

The Agreement prescribes the method of computing "*the entered value of the vessel*"—a sum not more than the aggregate of "*the basic value*" and "*the increased value.*"<sup>9</sup> If the

<sup>1</sup> See The Valuation Tribunal Rules, 1940 (S R & O, 1940, No. 728).

<sup>2</sup> War Risks Insurance Act, 1939, s. 1 (1), (3) Section 1 was deemed to have come into operation on 20th February, 1939.

<sup>3</sup> House of Commons Paper, No. 123, of 1943 See also Nos. 124 and 125.

<sup>4</sup> Clause 14.

<sup>5</sup> 22nd September, 1939 House of Commons Paper, No. 186 of 1939

<sup>6</sup> Liverpool and London War Risks Insurance Association, Ltd.; London Steamship Owners' Mutual Insurance Association, Ltd.; Newcastle War Risks Indemnity Association, Ltd.; North of England Protecting and Indemnity Association; Standard Steamship Owners' Mutual War Risks Association, Ltd.; Sunderland Steamship War Risks Association Ltd.; United Kingdom Mutual War Risks Association, Ltd.; West of England Mutual War Risks Association.

And see, *Agreement between certain approved War Risks Insurance Associations and the Minister of War Transport, on Financial Arrangements under the Schemes for Reinsurance of British Ships*, House of Commons Paper, No. 105, of 1944.

<sup>7</sup> Clause 1 (1). See para. (3) for adjustments, where the Minister notifies a reduction of premiums seven days after the signature of a "general armistice" between His Majesty and the German Reich, or, if there is no armistice, after the date when "in the opinion of the Minister major hostilities between His Majesty and the German Reich have ceased."

<sup>8</sup> Clause 1 (2).

<sup>9</sup> These terms are defined in cl. 2 (2).

increased value cannot be agreed, the dispute will be determined by "*The Valuation Tribunal*" appointed by the Lord Chancellor.<sup>1</sup> *Settlements* by the Association of losses and claims and *decisions* upon cancellation, return of premiums, salvage, and other incidental questions, will be *binding* upon the Minister *unless* his representatives *dissent in writing*.<sup>2</sup> Where the Minister thinks that the claim is legally enforceable in the name of the assured or jointly with the Association, *he may sue in the name of the assured* or in his name jointly with the Association.<sup>3</sup>

The *Agreement* may be determined by one month's written notice by the Association or the Minister.<sup>4</sup>

(b) *The War-time Original Policy for Time*<sup>5</sup> covers "*King's Enemy Risks*" only, i.e.—

"of capture, seizure, arrest, restraint, or detainment by the King's Enemies and the consequences thereof, or of any attempt thereat; also of the consequences of hostilities or warlike operations by or against the King's Enemies whether there be a declaration of war or not."

The following risks are *excepted* :—

(i) "collision, contact with any fixed or floating object (other than a mine or torpedo), stranding, heavy weather or fire unless caused directly (and independently of the nature of the voyage or service which the vessel concerned or, in the case of a collision, any other vessel involved therein, is performing) by a hostile act by or against a belligerent power; and for the purpose of this clause 'power' includes any authority maintaining naval, military or air forces in association with a power";

(ii) "civil war, revolution, rebellion, insurrection and civil strife arising therefrom and piracy."<sup>6</sup>

The Assured *warrant*—

(i) that the ship *will not engage in a trade prohibited* by His Majesty's Government or by the Association;

(ii) that the ship, so far as possible, *will obey all orders* given by or on behalf of His Majesty's Government and (subject to those) will comply with directions given by the Association;

(iii) that the ship *leave an enemy port* within the days of grace allowed by the enemy and comply with the terms of any pass granted by the enemy.

The assurance will not be invalidated if the assured satisfies the Association that the breach occurred without his fault or privity and without the fault or privity of the owners or managers, or occurred to avoid loss by King's Enemy Risks.<sup>7</sup>

<sup>1</sup> See cl. 2 (3) for its membership and powers.

<sup>2</sup> Clause 6.

<sup>3</sup> Clause 7 (1).

<sup>4</sup> Clause 13.

<sup>5</sup> First Schedule.

<sup>6</sup> Clause 1.

<sup>7</sup> Clause 5.

In the event of a *total loss by insured risk*, the Association (i) must pay *the assured*, six months after the loss, the *basic value*; (ii) must pay *the Minister* forthwith the *increased value*. In the event of loss by capture, seizure, arrest, restraint or detainment, if before the expiry of a specified number of days,<sup>1</sup> the ship is *recaptured or released or restored to the assured*, no claim against the Association shall be made except for—

- (i) *cost of repair* of damage received through the capture;
- (ii) *expenses* through capture or recapture;
- (iii) *compensation* at the rate of 10 per cent. on the insured value from capture to recapture.<sup>2</sup>

If the ship is *requisitioned* (unless, while under requisition, she is running under a charterparty where the Crown bears all risks), the policy will cover not only King's Enemy Risks, but "*war risks*," and also the assured's liability for contribution in general average and salvage arising out of any such war risk on the net hire at risk receivable under any charterparty under which the ship whilst on requisition is running.<sup>3</sup>

"*War risks*" means "the risks of war which would be excluded from an ordinary English policy of marine insurance by the following, or similar, but not more extensive clause:—

"Warranted free of capture, seizure, arrest, restraint or detainment and the consequences thereof or of any attempt thereat; also from the consequences of hostilities or war-like operations, whether there be a declaration of war or not; but this warranty shall not exclude collision, contact with any fixed or floating object (other than a mine or torpedo), stranding, heavy weather or fire unless caused directly (and independently of the nature of the voyage or service which the vessel concerned or, in the case of a collision, any other vessel involved therein, is performing) by a hostile act by or against a belligerent power; and for the purpose of this warranty 'power' includes any authority maintaining naval, military or air forces in association with a power. Further warranted free from the consequences of civil war, revolution, rebellion, insurrection or civil strife arising therefrom or piracy."<sup>4</sup>

## 2. Insurance by Board of Trade of Ships and Cargoes

The Board, with the approval of the Treasury, may carry on business for the following purposes:—

(a) The insurance of *British ships* against war risks or King's enemy risks when reasonable and adequate facilities for insurance and reinsurance are not otherwise available.

(b) The insurance *during war*, of *British ships* and the *insurance and reinsurance during war of foreign ships* (except

<sup>1</sup> Not less than twenty-one days, as specified by the Association.

<sup>2</sup> Clause 7.

<sup>3</sup> Clause 9 (1) and (2).

<sup>4</sup> Clause 9 (3).

those used in the service of the enemy), and of *liability for compensation* for death or injury of masters and crew.

(c) The insurance of *cargoes* carried in ships or aircraft against war risks or King's enemy risks, where reasonable and adequate facilities are not otherwise available.

(d) The insurance *during war* of *cargoes* carried in ships or aircraft (except those used in the service of the enemy).

(e) The insurance during war—

(i) of *goods*<sup>1</sup> *consigned for carriage by sea or air* from a place *outside* the United Kingdom, the Isle of Man or the Channel Islands, to a place inside one of those countries, while in transit between the ship or aircraft<sup>2</sup> and destination ;

(ii) of *goods consigned for carriage by sea or air* from a place *within* one of those countries to a place outside, while in transit between the premises from which they are consigned and the ship or aircraft.<sup>3</sup>

### 3. "War Risks" ; "King's Enemy Risks"

(a) "War risks," in *Part I* (other than s. 1), mean such risks as the Board of Trade, by order, define, arising from:—

(a) *Hostilities* (including action taken in repelling an imagined attack) ; (b) *rebellion* ; (c) *revolution* ; (d) *civil war* ; (e) *civil strife* consequent upon any of the preceding events. *Piracy* is included.<sup>4</sup>

(b) "King's enemy risks," in *Part I*, means such risks as the Board, by order, define, arising from—

(a) action taken *by an enemy* ; (b) action taken *in combating an enemy* ; (c) action taken *in repelling an imagined attack* by an enemy.<sup>5</sup>

In these orders the Board will have regard to the meaning of the expression in reinsurance agreements made under s. 1.

### 4. Compensation ; Transitional Provisions

The Board will pay as compensation *either* the value of the goods ascertained under rules made by the Board, or (as the case may be) the diminution in their value, due to loss or damage, if the plaintiff proves *four* matters:—

(a) Loss or damage by *King's enemy risks*.

(b) That the goods, *consigned for carriage by sea or air* from a place *outside* the United Kingdom, the Isle of Man

<sup>1</sup> "Goods," in *Part I*, include currency and securities payable to bearer ; bills of exchange or promissory notes are excluded : s. 6 (3).

<sup>2</sup> See s. 2 (2).

<sup>3</sup> Section 2 (1) (a)-(c).

<sup>4</sup> Section 6 (1) (a). See *In re Piracy Jure Gentium* [1934] A.C. 586, 608, per Viscount Sankey, L.C. The definition from Kenny, *Outlines of Criminal Law*, 14th ed., 332, is cited with approval (at 598) : "Any armed violence at sea which is not a lawful act of war." (See 15th ed. (1936), 376.)

<sup>5</sup> Section 6 (1) (b). See *Adams v. Naylor* [1944] 1 K.B. 750, 759, 765.

and the Channel Islands,<sup>1</sup> to a place within one of those countries—

(i) were discharged there from the ship or aircraft<sup>2</sup> before the end of seven days from the day the Board declared to be the day from which they would carry on business under s. 2 (1) (e)<sup>3</sup>;

(ii) were lost or damaged within "the appropriate period," that is, within fifteen days, or thirty days if the goods were to travel beyond the port of discharge,<sup>4</sup> while in transit between the ship or aircraft<sup>5</sup> and their destination; or

*having been consigned for carriage by sea or air from a place within one of those countries to a place outside before the end of seven days, were lost or damaged while in transit between the premises from which they were consigned and the ship or aircraft.*

(c) That he and *his agents* exercised all due care to prevent delay in transit.

(d) That at the time of the loss or damage *the property* in the goods was *vested in him*.<sup>5</sup>

#### 5. *Insurer's Insolvency : Reinsurer's Liabilities*

Where an insurer becomes entitled to any money through loss or damage arising from a risk against which he has insured the assured (either originally, or by reinsurance), *and* the money is payable by the Board under a reinsurance agreement *or* the money is payable under a contract of insurance by some other person—"the intermediate insurer,"—and the risk has been reinsured under a reinsurance agreement, then, upon "the insurer's insolvency" *before payment*,<sup>6</sup> the money must not be paid to him, but must be paid to the assured direct, either by the Board or (as the case may be) by the intermediate insurer. The assured's right to payment from the insurer—so far as it has been reinsured by the Board—is extinguished.

The specific circumstances ("insolvency") are—

(a) *bankruptcy*; or, if the insurer is a company,

(b) the *commencement of the winding-up* of the company; or

(c) the *appointment of a receiver* on behalf of debentures secured by a floating charge; or

(d) the *taking possession by or on behalf of such debenture-holders* of any property under the charge.<sup>7</sup>

<sup>1</sup> Section 3 (3).

<sup>2</sup> Section 3 (4) (a).

<sup>3</sup> 4th September, 1939; Krusin & Rogers, 301, *General Note*.

<sup>4</sup> Section 3 (4) (b) (i) (ii).

<sup>5</sup> Section 3 (1) (a), (b), (c), (d).

<sup>6</sup> If the loss occurs *after* payment, the assured will be left to his remedy in the bankruptcy: Krusin & Rogers, 303.

<sup>7</sup> Section 4.



The "War Risks (Marine Insurance) Fund" is established, under the control of the Board of Trade.<sup>1</sup>

## B. INSURANCE OF GOODS IN UNITED KINGDOM

### 1. *Commodity Insurance Scheme*

The Board of Trade may operate "The Commodity Insurance Scheme."<sup>2</sup> By this scheme, the Board undertake the liabilities of insuring against King's enemy risks, persons who carry on business as sellers<sup>3</sup> or suppliers<sup>4</sup> of goods insurable under Part II (*wherever the business is situate*), and who, from time to time, own those goods in the course of their business.<sup>5</sup>

The commodity insurance scheme may also extend<sup>6</sup>—

(a) to the undertaking by the Board of the liability to insure a *person carrying on business in the United Kingdom*,<sup>7</sup> as a seller or supplier of goods, against King's enemy risks on goods insurable under Part II, which are *not owned by him, but in which he has an interest* arising in the course of that business<sup>8</sup>;

(b) without prejudice to (a), to the undertaking by the Board of the liability to insure a person carrying on *any business*<sup>9</sup> in the United Kingdom, against King's enemy risks on goods *not owned by him, but which are insurable under Part II by the owner and are either—*

(i) goods in the United Kingdom which are *in his possession* for the purpose of that business (otherwise than under a hire-purchase agreement)<sup>10</sup> or;

(ii) goods in the United Kingdom which are *subject to a mortgage (excluding a floating charge) in his favour*, held by him in the course of that business.<sup>11</sup>

<sup>1</sup> Section 16 (1) (a); see Krusin & Rogers 316.

<sup>2</sup> Part II of the Act has been amended by S.R. & O., 1940, No. 771 (a consolidating order), and by Part II of the War Damage Act 1943, ss. 83-102.

<sup>3</sup> Including sellers of goods acting as agents: s. 15 (1) (b).

<sup>4</sup> "persons carrying on a business in the course of which they supply goods for the purpose of or in pursuance of contracts made by them for work, labour and materials": s. 15 (1) (bb).

<sup>5</sup> Section 7 (1), as amended.

<sup>6</sup> Section 7 (1A).

<sup>7</sup> Including, since 4th September, 1940, the Isle of Man. See Section 21A.

<sup>8</sup> For example, the bailee of goods under a hire-purchase agreement, and the interest arises in the course of his business: Krusin & Rogers, II, 393, 394.

<sup>9</sup> Excluding a profession, *op. cit.*, 393.

<sup>10</sup> As defined in Hire-Purchase Act, 1938, s. 21. Where the goods comprised in a hire-purchase agreement are not insurable under this Act, they are insurable by the dealer under the "business scheme" of the War Damage Act, 1943, s. 84, and by the hirer under "the business scheme" or "the private chattels scheme."

<sup>11</sup> For goods situate in the United Kingdom, see s. 15 (5).

## 2. Principles of Scheme

The scheme will secure—

(a) that the Board's liability is determined by a *policy of insurance* issued in the prescribed form<sup>1</sup>;

(b) that a *premium* will be payable at a prescribed rate<sup>2</sup>;

(c) that the amount of *any one premium* payable will not be less than a prescribed sum.<sup>3</sup>

For different descriptions of goods, different policies and periods may be prescribed, and different amounts of one premium according to different circumstances.<sup>4</sup>

The *prescribed form* may limit the indemnity provided by the Board and impose conditions.<sup>5</sup> It may incorporate, by reference, provisions set out in the order prescribing the form.<sup>6</sup>

## 3. Compulsory Powers during War

(a) While the commodity insurance scheme is in operation the Board is entitled to make "a compulsory insurance order" prohibiting, after a specified date, any person from carrying on any business in the United Kingdom as a seller or supplier of goods unless a policy of insurance is in force insuring under that scheme, for not less than their market value, any insurable goods owned by him in the course of his business.<sup>7</sup>

(b) By the War Risks Insurance (Compulsory Insurance of Commodities) Order, 1939, no person shall, after 3rd September, 1939, carry on business in the United Kingdom as a seller or supplier of goods, unless, in respect of insurable goods for the time being owned by him in the course of that business, a policy of insurance under the scheme is in force, for a sum not less than the value of the goods. The liability to insure does not arise if the value of the goods does not exceed £1,000.<sup>8</sup>

The Board may, by order, direct that a compulsory insurance order shall not require any person to insure goods of a specified description.<sup>9</sup>

(c) *Different rates of premium* may be prescribed for different descriptions of goods, and according to the place and the circumstances of the situation of the goods.<sup>10</sup>

<sup>1</sup> By order of the Board of Trade (s. 14 (1)), which may be varied or revoked.

<sup>2</sup> For orders prescribing the premiums payable in respect of each quarterly period, see Krusin & Rogers, II 410-411; III, 105; IV, 33; V, 77, 78.

<sup>3</sup> Section 7 (2). But see S.R. & O., 1944, Nos. 1314, 1325.

<sup>4</sup> Section 7 (3).

<sup>5</sup> Section 7 (2A). See prescribed form, Schedule to S.R. & O., 1941, No. 491.

<sup>6</sup> Section 7 (6); added by S.R. & O., 1940, No. 1142; *op. cit.*, II, 413, 414.

<sup>7</sup> Section 9 (1).

<sup>8</sup> S.R. & O., 1939, No. 1064; revoked by S.R. & O., 1940, No. 785.

<sup>9</sup> Section 9 (1c); War Damage Act, 1943, s. 86 (1), proviso. See art. 3 and Fourth Schedule to S.R. & O., 1941, No. 491 (*op. cit.*, II, 415, 417).

<sup>10</sup> Section 9 (3).

(d) The Board, in accordance with Treasury regulations, may, *where it appears expedient to the Board to avoid undue hardship*, pay otherwise than under a policy in pursuance of the scheme, for loss or damage by King's enemy risks occurring to goods owned by a person which, at the time of the loss or damage, were *insurable*, and concerning which he was exempted<sup>1</sup> from the duty to insure.<sup>2</sup>

#### 4. Goods Insurable under Part II

(a) "*Goods*" means goods as defined in the Sale of Goods Act, 1893.<sup>3</sup> The term includes "all chattels personal other than things in action or money," and also *agricultural products*.<sup>4</sup>

(b) In relation to a person carrying on business as a seller or supplier of goods of any description, *all goods situate in the United Kingdom* being (i) goods of that description, or (ii) goods used as material from which goods of that description are produced, or as their *ingredients or components*, are deemed to be insurable.<sup>5</sup>

(c) *No goods*, however, shall be deemed to be insurable—

(a) in relation to the *owner* who carries on business as *seller*, unless they are owned by him with a view of sale, or of being used as material to produce goods to be sold, or as ingredients or components of goods to be sold;

(b) in relation to the *owner* who carries on business as *supplier* unless they are owned by him with a view of being supplied for, or under, a contract for work, labour and materials, or if being used as material to produce goods to be so supplied, or as ingredients or components of goods to be so supplied.<sup>6</sup>

(d) For the purpose of provisos (a) and (b), goods will be deemed to be owned by the *person in whom the property is vested*. The term "*owner*," for this purpose, includes—

(a) a person for the time being *entitled, conditionally or unconditionally, to have the property vested* in him;

(b) *an agent carrying on business in the United Kingdom*, and entitled to sell goods the property of which is vested or is

<sup>1</sup> Under s. 9, proviso to subs. (1) or to subs. (1A) or (1C)

<sup>2</sup> Section 9A (1). Under this section, the Commodity Insurance (Special Payments) Regulations, 1943 (S.R. & O., 1943, No. 210), were made. They are deemed to have come into force on 5th September, 1940, and they relate back to loss or damage by "King's enemy risks" occurring on or after 3rd September, 1939 (*op. cit.*, V, 76, 77).

<sup>3</sup> Section 62 (1). See Chalmers, 158-160. *Gas* supplied by public utility undertakings, *water* and *electricity* are not included: see Chalmers, 160, Krusin and Rogers, 305, 323; S.R. & O., 1939, No. 1063, para. 3.

Special provisions apply to *ships* s. 15 (4), (4A) and (4B).

<sup>4</sup> War Risks Insurance Act, 1939, s. 15 (1) (c). "*Agricultural products*" is defined in para. (c) and includes growing crops, plants and trees.

<sup>5</sup> Section 11 (1) (a).

<sup>6</sup> Provisos (a) and (b) added, with retrospective effect, by War Damage Act, 1941, s. 77.

entitled to be vested in any person otherwise than in the course of business carried on by him in the United Kingdom.<sup>1</sup>

(e) *Agricultural products and livestock in the United Kingdom* are deemed to be insurable under Part II, where a person carries on in the United Kingdom the business of selling agricultural products produced by him.<sup>2</sup>

(f) Goods shall be deemed *not to be insurable* under Part II while they are *insured or reinsured by the Board under Part I*.<sup>3</sup>

(g) Without prejudice to s. 11 (3), the Board may, by order, direct that specified goods of any description shall be *deemed not to be insurable* under Part II.<sup>4</sup>

(h) Things which, in relation to a person carrying on business as *seller* of goods, are insurable under Part II, *will not cease to be insurable*, merely because they are *placed in or affixed to land* under a contract of sale in the course of that business.<sup>5</sup>

#### 5. Ownership of Goods

The owner of goods, at a given time, *for the purpose of Part II* (save as Part II expressly provides otherwise), is—

(a) the person *in whom the property is vested*, if, in relation to him, the goods are insurable under Part II ;

(b) the person, in relation to whom the goods are insurable,<sup>6</sup> who is *entitled, unconditionally or conditionally, to have the property vested* in him.

Where any goods would be deemed to be owned by a person in whom the property is vested, otherwise than in the course of a business carried on in the United Kingdom or who is entitled to have the property vested in him otherwise than in the course of such business ; and any person carrying on business in the United Kingdom is for the time being, entitled to sell *as agent*, the goods will be deemed to be owned by the latter.<sup>7</sup>

#### 6. King's Enemy Risks

In Part II,<sup>8</sup> "King's enemy risks" mean such risks as the Board, by order, define arising from—

(i) action *taken* by the enemy, or in *combating* the enemy, or in *repelling an imagined attack* by the enemy ;

(ii) measures taken under proper authority *to avoid the spreading of, or to mitigate, consequences of damage* occurring as the direct result of such action ;

(iii) *precautionary or preparatory measures* taken under proper authority *to prevent or hinder an attack by the enemy, involving a "substantial degree of risk to property"* ;

<sup>1</sup> Section 11 (1A), added with provisos (a) and (b). See previous note.

<sup>2</sup> Section 11 (2) ; terms are defined in s. 15 (1) (c) and (d).

<sup>3</sup> Section 11 (3).

<sup>4</sup> Section 11 (4).

<sup>5</sup> Section 11 (5).

<sup>6</sup> Section 15 (2), amended.

<sup>7</sup> Proviso to s. 15 (2).

<sup>8</sup> Contrast definition for the purpose of Part I, in s. 6 (1) (b), *supra*, 300.

(iv) *precautionary or preparatory measures involving the doing of work on land*, and taken under proper authority, in anticipation of enemy action, involving a substantial degree of risk to property.<sup>1</sup>

In *The War Risks (Commodity Insurance) (No. 2) Order, 1941*,<sup>2</sup> the Board defined the term as follows:—

(a) *Damage* occurring (accidentally or not) as 'the *direct result of action taken by the enemy*, or in combating the enemy, or in repelling an imagined attack.

(b) *Damage* occurring (accidentally or not) as the *direct result of measures under proper authority to avoid the spreading of*, or to *mitigate*, the consequences of such damage.

(c) *accidental damage* as the direct result—

(i) of *precautionary or preparatory measures* taken under proper authority to *prevent or hinder* an enemy attack ;

(ii) of precautionary or preparatory measures, *involving the doing of work on land*, and taken under proper authority, in anticipation of enemy action,

the measures involving a substantial degree of risk to property.

#### 7. *Prescribed Form of Policy*

Every policy under the commodity insurance scheme must be in the form prescribed in the *War Risks (Commodity Insurance) (No. 2) Order, 1941*.<sup>3</sup> Provisions specified in this order may be included in, or endorsed upon, the policy at the request of the person insured.<sup>4</sup> These provisions constitute "The Standard Policy."<sup>5</sup> The order also specifies a list of goods completely *uninsurable*,<sup>6</sup> and a list of goods *not compulsorily insurable*,<sup>7</sup> and defines "King's Enemy Risks."<sup>8</sup>

Among the *thirteen conditions* specified in the "*Standard Policy*," reference may be made to *five*.

(a) The Board may, instead of paying for the loss or damage, *replace or reinstate*—not exactly or completely, but only "as circumstances permit and in reasonably sufficient manner"; no more money need be expended than the value of the property at the time of the loss.<sup>9</sup>

(b) If, at the time of loss, the total interest of the insured in the property exceeds the sum insured, the insurer will be considered *his own insurer for the excess* and must bear a *rateable share of the loss*.<sup>10</sup>

<sup>1</sup> Section 15 (1) (a) inserted by the War Damage Act, 1941, s. 78.

<sup>2</sup> S.R. & O., 1941, No. 491, art. 4 (1).

<sup>3</sup> S.R. & O., 1941, No. 491, Sched. I, Part I.

<sup>4</sup> In Sched. I, Part II.

<sup>5</sup> Article 1 (1) and (2).

<sup>6</sup> Third Schedule, as amended by (No. 2) Order, 1942, S.R. & O., 1942, No. 741.

<sup>7</sup> Fourth Schedule.

<sup>8</sup> Article 4 (1).

<sup>9</sup> Condition 5, *Reinstatement*.

<sup>10</sup> Condition 6, *Average*.

(c) If any claim is *in any respect fraudulent*, or if *fraudulent means or devices* be used by the insured or anyone acting on his behalf to obtain any benefit, or if the loss or damage be occasioned by the *wilful act or connivance* of the insured, all *benefits will be forfeited*.<sup>1</sup>

(d) The premium, in whole or in part, is *not returnable*.<sup>2</sup>

(e) The policy is *not assignable*.<sup>3</sup>

For the purposes of Part II, the "*War Risks (Commodities) Insurance Fund*" has been established by the Board of Trade.<sup>4</sup>

## II. ILLEGAL RISKS

### 1. *Insurance on Enemy Trade, Property or Shipping*

(a) It is "inconsistent with the very purpose of a maritime war to permit insurance on the shipping and trade of the enemy."<sup>5</sup>

In *Furtado v. Rogers*,<sup>6</sup> insurances on behalf of a French ship, then an alien enemy, *though effected before the war*, could not cover a loss by British capture after war had broken out; nor could an action be brought after the war was over.

"For it being determined that during war all commercial intercourse with the enemy is illegal at common law, it follows that whatever contract tends to protect the enemy's property from the calamities of war, though effected antecedent to the war, is nevertheless illegal."<sup>7</sup>

Nor was the plaintiff entitled to the return of the premium: the contract was legal at the date of risk and was a good insurance against other losses.<sup>8</sup>

(b) This principle applies whether the loss is by *British*, or by *allied capture*; whether the insurance was *effected before or after the war* broke out; and whether the action was *brought during the war*, or *after*: a British insurance on alien property does not cover "any loss happening during the existence of

<sup>1</sup> Condition 9, *Fraudulent Claims*.

<sup>2</sup> Condition 10, *Premiums*.

<sup>3</sup> Condition 11, *Non-Assignability*.

<sup>4</sup> Section 16 (1) (b).

<sup>5</sup> Arnould, ss. 85, 86. Phillipson, 78-85; McNair, 239-243.

<sup>6</sup> (1802), 3 Bos. & P. 191, 195, 200, *per* Lord Alvanley, C.J. (Court of Common Pleas). See Willson, *The Insurance of Foreign Property in War Time* (1916), 32 L.Q.R. 373-383; (1917), 33 L.Q.R. 15-27. The principle was affirmed by Lord Ellenborough, C.J., of the Court of King's Bench, in *Kellner v. Le Mesurier* (1803), 4 East 396, where an insurance was effected *during war*, and in *Gamba v. Le Mesurier* (1803), 4 East 407, a case of *pre-war* insurance.

<sup>7</sup> The first case in which the point was directly decided that insurance of an enemy's property is, at common law, illegal. Lord Alvanley (at 197) gives Buller, J.'s interpretation of the other practice supported by Lord Mansfield. See 32 L.Q.R., at 375 and *Janson's Case* [1902] A.C. 484, 494, *per* Earl of Halsbury, L.C.

<sup>8</sup> *Ib.*, 201. *Vanduyck v. Hewitt* (1800), 1 East 96, 97, 98, *per* Lord Kenyon, C.J.

hostilities between the respective countries of the assured and the underwriters."<sup>1</sup>

In *Brandon v. Curling*,<sup>2</sup> goods bought on account of Frenchmen were placed on an American ship before, but exported after, war began between England and France, in 1793. The goods were seized by the Government of Spain (an ally of England), as prize. Insurance was effected by the plaintiff and was underwritten by the defendant, both British subjects. An implied term, said Lord Ellenborough, C.J., is engrafted on all policies where the insurance is upon goods generally: "*Provided that this insurance shall not extend to cover any loss happening during the existence of hostilities between the respective countries of the assured and the assurer.*"

(c) "A pre-war contract of marine insurance between a British subject and an enemy in the territorial sense is abrogated on the outbreak of war, whether the British subject or the other party is the insurer and whether the premium has already been paid or not . . ."<sup>3</sup>

(d) "This rule is not confined to insurance upon commercial property, e.g., merchant ships and cargoes, but extends to all property, and is not confined to insurances against the consequences of British or allied belligerent action."<sup>3</sup>

## 2. Loss while War Imminent

For a loss occurring *before* a state of war exists, even though war be imminent, insurers remain liable: *Janson's Case*.<sup>4</sup>

On 2nd October, 1899, when relations between England and the South African Republic were strained, South African gold in transit to the United Kingdom, and belonging to a South African company, was seized by order of the Republic. War began on 11th October. Even though the purpose of the seizure was to support the war against this country, the assured was entitled to recover on a policy insuring the gold against capture; the policy, made before the war by a person who was not an alien enemy then, or at the date of seizure, was valid.<sup>5</sup>

Both parties, said the Earl of Halsbury, L.C., had in their minds at the date of the policy the possibility and even the probability of war.<sup>6</sup> Trading with the King's enemies is illegal, but the "actual existence of the public enemy is assumed"; there must be a war between the two countries.<sup>7</sup>

<sup>1</sup> Arnould, s. 86. An insurance against seizure, of enemy property found on the field of battle or captured in taking a fortress, is illegal; Phillipson, 84; Pennant, *Insurances of Enemies' Property* (1902), 18 L.Q.R. 289-296, at 293.

<sup>2</sup> (1803), 4 East 410, 417.

<sup>3</sup> McNan, 243.

<sup>4</sup> [1902] A.C. 484. Arnould, s. 89, *supra*, 3, 1.

See a criticism of this case by Willson (1917), 33 L.Q.R. 24-27, who agrees with Vaughan Williams, L.J., that the insurance was contrary to the interests of the underwriter's country.

<sup>5</sup> *Per* Lord Lindley, at 507.

<sup>6</sup> *Ib.*, at 490.

<sup>7</sup> *Ib.*, at 493.

"It is war and war alone that makes trading illegal."<sup>1</sup>  
And Lord Macnaghten declared :—

"The law recognises a state of peace and a state of war, but . . . it knows nothing of an intermediate state which is neither the one thing nor the other—neither peace nor war."<sup>2</sup>

"However critical may be the condition of affairs, however imminent war may be, if and so long as the Government of the State abstains from declaring or making war or accepting a hostile challenge there is peace—peace with all its attendant consequences—for all its subjects."<sup>3</sup>

### 3. Cause of Action Accruing before War

Where the assured does not become an alien enemy until after the loss and the cause of action have arisen, his right to sue is *suspended* during the war, and upon the restoration of peace it revives : *Flindt v. Waters*.<sup>4</sup>

"But the defence of alien enemy must be accommodated to the nature of the transaction out of which it arises ; it may go to the contract itself on which the plaintiff sues, and operate as a perpetual bar ; or the objection may, in a case of this sort, be merely personal, in respect to the capacity of the party to sue upon it . . . But here the objection is only of a temporary nature : the contract itself was perfect at the time it was made : the trade was with an alien friend, which required no licence, though one was obtained *ex abundanti cautela*."

"The insurance, the loss and cause of action had arisen before the assured had become alien enemies ; when, therefore, they became such, it was only a temporary suspense of their own right of suit in the courts here, as alien enemies . . . "<sup>5</sup>

In *Janson's Case*,<sup>6</sup> Lord Davey stated three established rules of the common law. *First*, the King's subjects must not trade with an alien enemy without the King's licence. The *second* principle is a corollary, but rests upon "distinct grounds of public policy," namely : "no action can be maintained against an insurer of an enemy's goods or ships against capture by the British Government. . . . The principle equally applies where the insurance is made previously to the commencement of hostilities, and was, therefore, legal in its inception, and whether the person claiming on the policy is a neutral or even a British subject if the insurance is effected on behalf of an alien enemy."

<sup>1</sup> [1902] A.C., at 494.

<sup>2</sup> *Ib.*, at 497.

<sup>3</sup> *Ib.*, at 498.

<sup>4</sup> (1812), 15 East 260, 266. *per* Lord Ellenborough, C.J.

<sup>5</sup> See the comments by Rowlatt, J., in *Schmitz v. Van der Veer & Co.* (1915), 84 L.J.K.B. 861. See also *Harman v. Kingston* (1811), 3 Campb. 150, 153, *per* Lord Ellenborough : "The fact of the persons interested having become alien enemies since the loss, only goes to suspend the remedy, and ought to have been pleaded in abatement."

<sup>6</sup> [1902] A.C. 484, 499. See also *per* Earl of Halsbury, L.C., at 493.



The *third* rule is that, "if a loss has taken place before the commencement of hostilities, the right of action on a policy of insurance by which the goods lost were insured is suspended during the continuance of war and revives on the restoration of peace."

#### 4. Insurance on British Trade with Enemy

Since it is illegal to trade with the enemy, insurances on British trade with the enemy are also illegal: *Potts v. Bell*.<sup>1</sup>

In 1797 a policy was effected by brokers in London for the benefit of the plaintiffs, London merchants. The ship was a neutral ship, bound on the voyage from Rotterdam to Hull, but the United Provinces (with whom England was then at war) would not permit the ship to be cleared for any British port. The ship, having sailed, was captured the next day by the French, then the King's enemies. The goods, bought by the plaintiffs' agents residing in the enemy's country, were then insured in London. The original act unlawful, "no subsequent contract for giving it effect can be supported in law."

#### 5. Insurance on Neutral Ships for Enemy's Colonial Trade

(a) An insurance on a neutral ship engaged in the coasting of the colonial trade of the enemy is illegal: *Berens v. Rucker*.<sup>2</sup>

"The rule is," said Lord Mansfield, "that if a neutral ship trades to a French colony, with all the privileges of a French ship, and is thus adopted and naturalised, it must be looked upon as a French ship and is liable to be taken. Not so, if she has only French produce on board, without taking it in at a French port: for it may be purchased of neutrals."

(b) The principle applies to an insurance on *belligerent goods carried in a neutral ship*; it could not be enforced in the courts of the hostile belligerent. But an insurance by a neutral to be enforced in the courts of a neutral, is valid.<sup>3</sup>

#### 6. Insurance on Contraband

(a) An insurance on *contraband* is void in the country of the hostile belligerents: *Gibson v. Service*.<sup>4</sup>

<sup>1</sup> (1800), 8 Term Rep. 548. See Willson (1916), 32 L.Q.R. 378; McNair, 249.

<sup>2</sup> (1771), 1 Wm. Bl. 313, 314.

<sup>3</sup> Arnould, s. 772.

<sup>4</sup> (1914), 5 Taunt. 433. For "contraband" and its categories, see Oppenheim, II, 655-669; Arnould, ss. 761-764; 2 Pitt Cobbett, 480, 494-507; Higgins and Colombos, 482-503. For *absolute* contraband, and *conditional* contraband, see *A Proclamation as to Contraband of War*, 3rd September, 1939; Trotter, 653, 654; Higgins & Colombos, 494, 495. See also *Order in Council Framing Reprisals for Restricting Further the Commerce of Germany* (S.R. & O., 1939, No. 1700). And see S.R. & O., 1940, No. 979, applying this order to Italy.

Upon the classification of goods as contraband or not contraband, see *The Peterhoff* (1866), 5 Wall. 28, 58, per Chase, C.J.

(b) The principle applies to an insurance on a voyage in violation of a blockade: *The Mercurius*.<sup>1</sup>

The ship was captured on a voyage from Baltimore to Amsterdam which was then blockaded. Violation of the blockade, it was held, affects the master of the ship, but not the cargo unless it belongs to the same owner, or unless the cargo owner knows of the violation.

(c) The principle is otherwise if the policy was effected for a neutral, to be enforced in the courts of a neutral.<sup>2</sup>

But the nature of the trade and of the goods must be disclosed to the underwriter, or there must be just ground to presume that he was duly informed.<sup>3</sup>

### III. LAWFUL RISKS

#### 1. *Enemy having Licence to Trade*

An alien enemy having a licence to trade may insure his property and may sue upon the policy: *Usparicha v. Noble*.<sup>4</sup>

A Spaniard, having a commercial domicile here during war between England and Spain, was licensed to ship goods in a neutral vessel from England to Spain.

"The commerce itself is to be regarded as legalised for all purposes of its due and effectual prosecution . . . The Crown, in licensing the end, impliedly licenses all the ordinary legitimate means of attaining that end."

The licensee, for the purpose of the licensed act of trading, is regarded as "virtually an adopted subject"; his trading is British trading; he could insure the goods to Spain either on his own account, or on the account of his correspondents.<sup>5</sup>

A broker who had effected a policy for three persons, two of whom became alien enemies before the action, and of whom the third had obtained a licence to trade, was entitled to sue on the policy.<sup>6</sup>

#### 2. *Insurance to Friendly or Neutral Port*

An insurance on goods to be delivered to a neutral to a friendly or neutral port is valid, even though the neutral is resident in a port of hostile occupation: *Hagedorn v. Bell*.<sup>7</sup>

<sup>1</sup> (1798), 1 C. Rob. 80, 85, per Sir W. Scott. See Higgins & Colombos, 501. For "blockade" and "breach of blockade," see Oppenheim, 625-649; Arnould, ss. 766-770; 2 Pitt Cobbett, 460-471; Higgins & Colombos, 517-553.

See also *The Peterhoff* (1866), 5 Wall. 28, 50-52, per Chase, C.J.

<sup>2</sup> Arnould, ss. 760, 765, and authorities.

<sup>3</sup> Arnould, s. 765.

<sup>4</sup> (1811), 13 East 332, 340, 341, per Lord Ellenborough, C.J.

<sup>5</sup> Where part of the cargo is licensed, and part unlicensed, the insurance on the licensed part is valid, unless the contract is indivisible: Phillipsen, 83, citing *Pieschell v. Allnut* (1813), 4 Taunt. 792.

<sup>6</sup> *De Tastet v. Taylor* (1812), 4 Taunt. 233; Arnould, s. 88.

<sup>7</sup> (1813), 1 M. & S. 450, 467, per Bayley, J.; Arnould, s. 757.

The plaintiff merchant was licensed to export a specified cargo to any port of the Baltic not under blockade. Until 1811 Hamburg claimed to be a sovereign State. In 1806 French troops had occupied the port and continued in operation; but until 1810 the senate of Hamburg continued in full exercise of sovereign civil authority. British merchants were subsequently permitted to carry on their trade unmolested. In 1811 the senate was deposed by the French Emperor.

Although acts had been committed which entitled this country to consider her as hostile, the port, it was held, must be regarded as neutral. Orders in Council had provided that ships and goods belonging to Hamburg, and engaged in trade to and from this country, should not be liable to detention.

In *Muller v. Thompson*,<sup>1</sup> Lord Ellenborough held that although British commerce was excluded from Prussia, yet, in the absence of a state of war, an insurance on British property shipped for a Prussian port was not illegal.

### 3. *Neutral Goods carried with Enemy Goods*

An insurance of neutral goods insured by a separate policy, on a ship carrying enemy's goods, is valid: *Barker v. Blakes*.<sup>2</sup>

British underwriters were held liable to neutral owners of neutral goods carried on an American ship from New York to Havre, which had on board some enemy property.

The indemnity sought under the policy, said Lord Ellenborough, was not an indemnity to an enemy, or to a neutral forfeiting his neutrality by a hostile act,

"but an indemnity to a neutral, as such, against the consequences of an act innocently and allowably done by him in the exercise of his own neutral rights . . ."

### 4. *British Subject with Foreign Commercial Domicil*

A British subject, possessing a commercial domicil in a foreign country, becomes, for commercial purposes, the subject of that country.<sup>3</sup> He may trade as a neutral with the enemy.<sup>4</sup> He may recover upon an insurance policy effected upon such trade which, for a British subject, would be illegal, but is legal by treaty for the citizens of his commercial domicil.<sup>5</sup>

In *Wilson v. Marryatt*,<sup>6</sup> a British subject, possessing a commercial domicil in the United States, was permitted to voyage from America to East Indies in a manner unlawful to British subjects with commercial domicil in Britain.

<sup>1</sup> (1811), 2 Camp. 609, 610.

<sup>2</sup> (1808), 9 East 283, 292, 293.

<sup>3</sup> Arnould, ss. 93, 95; *supra*, 92-94.

<sup>4</sup> *The Danous* (1802), cited in 4 C. Rob. 255n; Arnould, s. 95.

<sup>5</sup> Arnould, s. 755.

<sup>6</sup> (1798), 8 Term Rep. 31, 45, *per* Lord Kenyon, C.J.

See also *The Emanuel*, where Sir W. Scott observed :—

“ A person living *bona fide* in a neutral country, is fully entitled to carry on a trade to the same extent as the native merchants of the country in which he resides ; provided it is not inconsistent with his native allegiance.”<sup>1</sup>

In *Bell v. Reid*,<sup>2</sup> the action was brought against an underwriter upon a policy of insurance on ship and freight from Virginia to her port of discharge in the United Kingdom or any port in the Baltic. The ship, after lying at Falmouth, received orders for Gottenburg ; having arrived, she was proceeding to Elsinore, when she was captured by a Danish ship. England was then at war with Denmark, but America was in amity. Lord Ellenborough held that a natural-born British subject, having a commercial domicile in America, might lawfully exercise the commercial privileges allowed to a citizen of the United States ; he could recover on the policy.

This privilege would not apply to a British subject emigrating into a neutral country *flagrante bello*.<sup>3</sup>

#### 5. Reasonable opportunity to return, on Outbreak of War

A British subject who possesses a commercial domicile in an enemy country has a reasonable opportunity, after the outbreak of war, to show by his acts whether he intends to continue his commercial domicile in that country.<sup>4</sup>

(a) A metal company in Natal owned a mine in the Transvaal. A few days after the Republic declared war, the Republican Government seized some product of the mine. Upon the

<sup>1</sup> (1799), 1 C. Rob. 296, 302.

<sup>2</sup> (1813), 1 M & S. 726, 733.

<sup>3</sup> Arnould, s. 95, and authorities there cited ; s. 755 (s). See *The Dos Hermanos* (1817), 2 Wheat. 76, 98, per Story, J. ; and *The Anglo-Mexican* [1918] A.C. 425.

<sup>4</sup> Arnould, s. 94, following the opinion of Marshall, (C.J., who dissented in *The Venus* (1814), 8 Cranch, Supreme Court R. 253, *infra*. See *The Ocean* (1804), 5 C. Rob. 90, 91. A British merchant settled in Holland, at the outbreak of war with Holland had taken means to remove himself and return to England. He had “ taken himself out of the effect of supervening hostilities,” said Sir W. Scott.

Compare the privilege accorded to a neutral, who, wherever residing, has a commercial domicile in a country which becomes an enemy country, of being allowed a reasonable interval to discontinue or disassociate himself from his business in the enemy country, per Lord Parker, in *The Anglo-Mexican* [1918] A.C. 422, 425, 426. And see per Lord Porter in *The Soufracht Case* [1943] A.C. 203, 237 : “ . . . a person who is engaged in business in a country which becomes hostile but is not residing there is given a reasonable time to disassociate himself from that business if he wishes to avoid becoming an alien enemy, and even if he resides in such a country it may be that he will escape the imputation of hostility by removing himself as quickly as is reasonably possible (see *The Anglo-Mexican*) . . .”

Where goods are shipped by a neutral firm to an enemy branch, “ the taint of enemy ownership may be removed ” by changing the destination before the outbreak of war. “ In principle . . . a withdrawal from enemy destination comes too late if made after the outbreak of war ” : per Lord Porter, in *Part Cargo Ex M. V. Glenroy* (1945), 61 T.L.R. 303, 306 (for Judicial Committee of Privy Council, in Prize, setting aside decree of Lord Merriman, P., in *The Glenroy* [1944] P. 11).

declaration of war, the company shut down the mine; it was held that they could recover upon the policy insuring the gold: *Nigel Gold Mining Co. v. Hoade*.<sup>1</sup>

"The subject of one country, surprised by a declaration of war in the country where he has a commercial domicile, ought to have time allowed him to free himself from his commercial engagements and effect a removal of his property."

(b) In *The Venus*,<sup>2</sup> the Supreme Court of the United States decided otherwise, but Marshall, C.J., in a weighty opinion, dissented, and his opinion is generally approved.

"Measures taken for removal immediately after a war may prove a previous intention to remove in the event of a war, and may prove that the captured property, although, *prima facie*, belonging to an enemy, does in fact belong to a friend. In such a case, the citizen, in my opinion, has a right, in the nature of the *jus postliminii*, to claim restitution."<sup>3</sup>

A change in the situation, as a result of which war breaks out between the country of his nationality and the country of his commercial domicile, affords a presumption of an intention to return home.<sup>4</sup>

"If such a person [i.e., an American merchant] were required on his arrival in a foreign country, to declare his real intentions on the subject of residence, he would, most probably, say, if he spoke honestly, 'I came for the purpose of trade: I shall remain while the situation of the two countries permits me to carry on my trade lawfully, securely and advantageously; when that situation so changes as to deprive me of those rights, I shall return.'"<sup>5</sup>

"To me it seems that a mere commercial domicile acquired in time of peace necessarily expires at the commencement of hostilities. Domicil supposes rights incompatible with a state of war."<sup>6</sup>

His "commercial character" is not so "conclusively fixed upon him . . ." as to disqualify him from showing that—

"within a reasonable time after the commencement of hostilities, he made arrangements for returning to his own country . . . Removal or measures showing a determination to remove within a reasonable time after the war may retroact upon property shipped before a knowledge of the war and rescue that property from the hostile character attached to the property of the nation in which the individual resided."

<sup>1</sup> [1901] 2 K.B. 849, 854, *per* Mathew, J.

<sup>2</sup> (1814), 8 Cranch, 253. The opinion of the majority was delivered by Washington, J. (273-287). See, in particular, at 280-284.

<sup>3</sup> *Ib.*, 289.

<sup>4</sup> *Ib.*, 295.

<sup>5</sup> *Ib.*, 297. Marshall, C.J., closely examined the judgments of Sir W. Scott in *The Harmony* (1800), 2 C. Rob. 322, 325, *The Diana* (1803), 5 C. Rob. 59, 66, and other cases.

Thus, overt acts made in good faith may manifest the requisite intention, such as—

“dissolution of partnership, discontinuance of trade in the enemy country, a settlement of accounts, and other arrangements obviously preparatory to a change of residence . . .”<sup>1</sup>

The proposition is confined to property shipped *before a knowledge of the war*; if shipped afterwards, it is liable to condemnation, unless it is “merely a withdrawing of funds.”

“A continuance of trade after the war [*sc.* began], unless, perhaps, under very special circumstances, and for the mere purpose of closing transactions already commenced, would fix the national character and the domicile previously acquired. An immediate discontinuance of trade, and arrangements for removing, followed by actual removal within a reasonable time, unless detained by causes which might sufficiently account for not removing, would fix the intention to change the domicile, and show that the intention to return had never been abandoned; that the intention to remain always had never been formed.”<sup>1</sup>

#### IV. PROXIMATE CAUSE OF LOSS

##### 1. *Perils of the Sea*

(a) “Perils of the sea,” whether in policies of insurance, charter-parties, or bills of lading,<sup>2</sup> include—

“Any damage to the goods carried by sea-water, storms, collision, stranding, or other perils peculiar to the sea or to a ship at sea, which could not be foreseen or guarded against by the shipowner or his servants as necessary or probable incidents of the adventure.”<sup>3</sup>

The term cannot be exactly and inclusively defined: “. . . each case must be considered with reference to its own circumstances, and [that] the circumstances of each case must be looked at in a broad commonsense view and not by the light of strained analogies and fanciful resemblances.”<sup>4</sup>

There must be a *peril*—something fortuitous; the peril must

<sup>1</sup> *Ib.*, 315. See *The William Bagaly* (1866), 72 U.S. 377, 408, *per* Clifford, J.: “Promptitude is therefore justly required of citizens resident in the enemy country, or having personal property there, in changing their domicile, severing their business relations, or disposing of their effects . . .”

<sup>2</sup> See *per* Lord Herschell in *The Xantho* (1887), 12 A.C. 503, 509, 510, and *per* Lords Watson and Bramwell in (1887), 12 A.C. 518, 525, 527.

<sup>3</sup> Scrutton, art. 83, who collated the proposition from the judgments in *Thames and Mersey Insurance Company v. Hamilton* (1887), 12 A.C. 484; *The Xantho* (1887), 12 A.C. 503; *Hamilton v. Pandorf* (1887), 12 A.C. 518. And see Scrutton 248, 249, upon *causa proxima, non remota, spectatur*.

<sup>4</sup> *Per* Lord Macnaghten in the *Thames & Mersey Case* (1887), 12 A.C. 502. See the exposition of this “trilogy of decisions” by Langton, J., in *The Stranna* [1937] P. 130, 140 *et seq.*; affirmed [1938] P. 69.

be of the sea—caused by the sea; and the peril must be of the sea—not caused by the inevitable action of winds and waves.<sup>1</sup>

(b) Lord Herschell, in *The Xantho*,<sup>2</sup> said:—

“I think it clear that the term ‘peril of the sea’ does not cover every accident or casualty which may happen to the subject and matter of the insurance on the sea. It must be a peril ‘of’ the sea. Again, it is well settled that it is not every loss or damage of which the sea is the immediate cause that is covered by these words. They do not protect, for example, against that natural and inevitable action of the winds and waves, which results in what may be described as wear and tear. There must be some casualty, something which could not be foreseen as one of the necessary incidents of the adventure. The purpose of the policy is to secure an indemnity against accidents which may happen, not against events which must happen. It was contended that those losses only were losses by perils of the sea, which were occasioned by extraordinary violence of the winds or waves. I think this is too narrow a construction of the words, and it is certainly not supported by the authorities, or by common understanding. It is beyond question, that if a vessel strikes upon a sunken rock in fair weather and sinks, this is a loss by perils of the sea. And a loss by foundering, owing to a vessel coming into collision with another vessel, even when the collision results from the negligence of that other vessel, falls within the same category.”

(c) Where rats gnawed a hole in a pipe on board a ship and, the shipowners not being negligent, sea-water escaped and damaged a cargo of rice, this was a loss by perils of the sea: *Hamilton, Fraser & Co. v. Pandorf & Co.*<sup>3</sup>

“I think the idea of something fortuitous and unexpected is involved in both words, ‘peril’ or ‘accident’; you could not speak of the danger of a ship’s decay; you would know that it must decay, and the destruction of the ship’s bottom by vermin is assumed to be one of the natural and certain effects of an unprotected wooden vessel sailing through certain seas.”<sup>4</sup>

There was a peril of the sea no less because the hole was made by vermin within, not by a sword-fish from without.<sup>4</sup>

(d) Where rice had been damaged by heat caused by the closing of ventilation during a voyage to prevent the incursion of the sea, and the weather and sea constituted a peril of the

<sup>1</sup> Arnould, s. 812. See also *per* Lord Halsbury, L.C., in *Hamilton, Fraser & Co. v. Pandorf & Co.* (1887), 12 A.C. 518, 523. But see the speech of Lord Wright in *The Canada Rice Mills Case* [1941] A.C. 55, 70, *infra*, 317.

<sup>2</sup> (1887), 12 A.C. 503, 509.

<sup>3</sup> (1887), 12 A.C. 518.

<sup>4</sup> *Ib.*, 524, 525, *per* Lord Halsbury, L.C.

sea, the loss was due to peril of the sea : *Canada Rice Mills, Ltd. v. Union Marine & General Insurance Co., Ltd.*<sup>1</sup>

Lord Wright declared :—

“Where there is an accidental incursion of sea-water into a vessel at a part of the vessel, and in a manner, where sea-water is not expected to enter in the ordinary course of things, and there is consequent damage to the thing insured, there is *prima facie* a loss by perils of the sea. The accident may consist in some negligent act, such as improper opening of a valve, or a hole made in a pipe by mischance, or it may be that sea-water is admitted by stress of weather or some like cause bringing the sea over openings ordinarily not exposed to the sea, or, even without stress of weather, by the vessel heeling over owing to some accident, or by the breaking of hatches or other coverings.”<sup>2</sup>

It is a question of fact. A failure to close the ventilators is just as much “an accident of navigation” as the *improper opening* of a valve.<sup>3</sup> In the present case the ventilators were closed through a storm. A storm may be a “normal incident” of a voyage ; if, in consequence, a cargo is damaged by incursion of the sea, it is for the jury to say whether the damage was due to a peril of the sea. Even where damage is caused by a storm whose “incidence or force is not exceptional,” the loss may be due to perils of the sea.<sup>4</sup>

Was damage caused not by the incursion of sea water, but by action taken to prevent the incursion, recoverable as loss due to perils of the sea ? The closing of the ventilators is to be regarded “not as a separate or independent cause . . .

“but as being such a mere matter of routine seamanship necessitated by the peril that the damage can be regarded as the direct result of the peril.”<sup>5</sup>

“Proximate cause” in insurance law does not necessarily mean the cause last in time, but “what is ‘in substance’ the cause,”<sup>6</sup> or the cause “to be determined by commonsense principles.”<sup>6</sup>

<sup>1</sup> [1941] A.C. 55.

<sup>2</sup> *Ib.*, 68, 69.

<sup>3</sup> *Ib.*, 69. See *Niter & Co., Ltd. v. Licenses Insurance Company, Ltd.* (1944), 1 All E.R. 341, 343, where Tucker, J., thought that if cargo properly stowed, and in good condition when loaded, had become stowed in through the labouring of a ship in heavy weather, that would be a loss due to a peril of the sea.

<sup>4</sup> *Ib.*, 70. Lord Wright quotes from the speech of Lord Sumner in *Mountain v. Whittle* [1921] 1 A.C. 815, 630, 631, where a bow wave raised by a tug and tow raised four feet of water into the defective seams of a houseboat : “and sinking by such a wave seems to me a fortuitous casualty ; whether formed by passing steamers or between tug and tow it was beyond the ordinary action of wind and wave, or the ordinary incidents of such towage.”

<sup>5</sup> Citing Lord Finlay in *The Loylant Shipping Case* [1918] A.C. 350, 355.

<sup>6</sup> Citing Lord Dunedin, *ib.*, 362.



2. *Proximate Cause Alone*

If the proximate cause of the loss of a ship is perils of the sea, e.g., grounding through the extinction of lights during a war, the marine risks underwriters remain liable : *Ionides v. Universal Marine Insurance Co.*<sup>1</sup>

In ascertaining the rights of the parties, said Willes, J.,

"You are not to trouble yourself with distant causes, or go into a metaphysical distinction between causes efficient and material and causes final ; but you are to look exclusively to the proximate and immediate cause of the loss."

This does not mean proximate in point of time, for the entry of sea water is almost inevitably proximate in point of time, and the entry of sea water is a peril of the sea. It means proximate in "efficiency as an operating factor upon the result."<sup>2</sup> This maxim has "always been treated as of special sanctity in marine insurance . . ."<sup>3</sup>

Six thousand five hundred bags of coffee, valued at £25,000, were insured on a voyage from Rio de Janeiro to New Orleans, and thence to New York, "warranted free from capture, seizure and detention . . . and free from all consequences of hostilities . . ." At the time of the ship's departure, the American Civil War was in progress. The ship was Federal ; the cargo, neutral. On the voyage from New Orleans to New York the master, "being out of his reckoning," through the extinction by the Confederates of headland light at Cape Hatteras, went on shore off North Carolina, without any possibility of getting off ; the ship was boarded by Confederate officers and the captain and the crew were detained as prisoners. Federal salvors salvaged 150 bags ; but for Confederate interference, they might have salvaged 1,000 more. The next day, the weather became boisterous and all the cargo on board was lost. The insurers were liable for a partial loss, through perils of the sea, in respect of the coffee on board which could not be saved ; for the cargo saved, and for the cargo which, but for the Confederates, would have been saved, the insurers were not liable.

Erle, C.J., gives pointed illustrations of the "consequence of hostilities." If, during an attempt to seize the ship, the master ran ashore and the ship was lost, that would be a loss in "consequence of hostilities." On the other hand, "if the ship is chased by a cruiser, and to avoid capture, gets into a bay where there is neither harbour nor anchorage and is, in consequence, driven ashore by the wind and lost, the *proximate*

<sup>1</sup> (1863), 14 C.B. (N.S.) 259, 289. See the learned arguments of Queen's Counsel (at 283-283) ; on the one side, Bovill and Lush ; on the other, Brett and Mellish.

<sup>2</sup> *Per* Lord Shaw in *Leyland Shipping Co. v. Norwich Union Fire Insurance Society* [1918] A.C. 350, 370 ; and *per* Lord Dunedin, *ib.*, at 363.

<sup>3</sup> Lord Wright, *Legal Essays and Addresses*, 283.

cause of the loss would be perils of the sea, not the attempt at seizure."<sup>1</sup>

The extinction of the headland light may, or may not, have been the cause of the destruction of the vessel, said Willes, J., but it was not "the proximate and absolute certain cause of the loss"—which was getting on the rocks at the Hatteras inlet.<sup>2</sup>

"The words 'all consequences of hostilities' refer to the totality of causes, not to their sequence, or their proximity or remoteness."<sup>3</sup>

If there had been no hostilities the 1,000 bags would have been saved.<sup>4</sup> But did the hostilities have any effect in bringing about the loss of the rest of the cargo?<sup>5</sup>

"The 5,350 bags were lost to the assured and to all mankind from the moment the ship settled on the rocks without a possibility of their being brought on shore."<sup>6</sup>

Byles, J., gave a lively illustration:—

"Suppose a man throws himself into the Serpentine, and the means of rescuing him are not at hand, and he is drowned. Could it be said in that case that the man was drowned because of the absence of the saving power? Apply that here. The absence of the light at Cape Hatteras was but the absence of a warning, leaving the proximate and immediate cause of the loss, the miscalculation of the captain which is plainly a loss by the perils of the sea."<sup>7</sup>

### 3. "Dominant" or "Proximate in Efficiency"

Where a torpedoed vessel, taken into port, sinks through inability to resist a moderate amount of rough weather, the war peril (*sc.* the torpedo), though earlier in time, is the proximate or "dominant" cause of the loss: *Leyland Shipping Co. v. Norwich Union Fire Insurance Society*.<sup>8</sup>

The ship, on a voyage from South America to Havre, was torpedoed near Havre. With the aid of tugs she reached Havre on the same day, where she was taken alongside a quay. A gale sprang up, causing her to bump; she was ordered to the outer breakwater, where she was moored; her bulkhead finally giving way, she sank.

Lord Dunedin said:—

"The case turns on a pure question of fact, to be determined by common-sense principles. What was the cause of the loss of the ship? I do not think the ordinary man would have any

<sup>1</sup> (1863), 14 C.B. (N.S.)

<sup>2</sup> *Ib.*, 289.

<sup>3</sup> *Ib.*, 290.

<sup>4</sup> *Ib.*, 293.

<sup>5</sup> *Ib.*, 294.

<sup>6</sup> *Ib.*, 295.

<sup>7</sup> *Ib.*, 296, 297.

<sup>8</sup> [1918] A.C. 350, 363. Contrast *The Lavington Court* (1944), 2 All E.R. 249, where a torpedoed ship sank fourteen days later. The claim was for hire under a charterparty, and on the facts it was held that no actual or constructive total loss had occurred on the date when the motorship was torpedoed.

difficulty in answering she was lost because she was torpedoed.”<sup>1</sup>

Lord Shaw of Dunfermline observed :—

“The true and overruling principle is to look at a contract as a whole and to ascertain what the parties to it really meant. What was it which brought about the loss, the event, the calamity, the accident? And this not in an artificial sense, but in that real sense which parties to a contract must have had in their minds when they spoke of cause at all.”<sup>2</sup>

*Proxima causa* is not the cause nearest in time. “Chain of causation” is an inadequate figure :—

“Causation is not a chain, but a net. At each point influences, forces, events, precedent and simultaneous, meet; and the radiation from each point extends infinitely.”<sup>2</sup>

“The cause which is truly proximate is that which is proximate in efficiency. That efficiency may have been preserved although other causes may meantime have sprung up which have not yet destroyed it, or truly impaired it. . . .”<sup>2</sup>

“Proximate cause is an expression,” continued Lord Shaw, “referring to the efficiency as an operating factor upon the result. Where various factors or causes are concurrent, and one has to be selected, the matter is determined as one of fact, and the choice falls upon the one to which may be variously ascribed the qualities of reality, predominance, efficiency.”<sup>3</sup>

#### 4. “Direct Cause,” or “the Meaning of the Contract”

“Cause and effect are the same for underwriters as for other people. Proximate cause is not a device to avoid the trouble of discovering the real cause or the ‘common-sense cause’ . . . I believe it to be nothing more nor less than the real

<sup>1</sup> [1918] A.C. 362.

<sup>2</sup> *Ib.*, 369. Cardozo, J., cites this passage in *Bird v. St. Paul Fire & Marine Insurance Co.* (1918), 224 N.Y. 47, saying :—

“From this complex web, the law picks out now this cause and now that one. The same cause producing the same effect may be proximate or remote as the contract of the parties seems to place it in light or shadow. That cause is to be held predominant which they would think of as predominant. A common-sense appraisalment of every-day forms of speech and modes of thought must tell us when to stop. It is an act of judgment as upon a matter of fact.”

And finally, these great words :—

“Everything in nature is cause and effect by turns. For the physicist, one thing is the cause; for the jurist, another. Even for the jurist, the same cause is alternately proximate and remote as the parties choose to view it . . . A collision occurs at sea, and fire supervenes. The fire may be the proximate cause and the collision the remote one for the purpose of an action on the policy. The collision remains proximate for the purpose of suit against the colliding vessel. There is nothing absolute in the legal estimate of causation. Proximity and remoteness are relative and changing concepts.”

<sup>3</sup> *Ib.*, 370.

meaning of the parties to a contract of insurance . . . The *causa proxima* rule is not merely a rule of statute law, but is the meaning of the contract writ large . . . I think, 'direct cause' would be a better expression than *causa proxima*": *Becker, Gray & Co. v. London Assurance Corporation, per Lord Sumner*.<sup>1</sup>

In July, 1914, the plaintiffs, British merchants, shipped goods on a German ship, for carriage from Calcutta to Hamburg and insured them against the usual perils, including "men of war . . . enemies . . . takings at sea, arrests, restraints and detentions of all kinds, princes and people of what nation, condition and quality soever." While the goods were at sea, war broke out; the master put into Messina, a neutral port, to avoid capture, and the voyage was abandoned. The merchants gave notice of abandonment which the company refused to accept. At the trial, a letter was produced from the Admiralty stating that any German steamer proceeding through the Mediterranean to Hamburg would have been in peril of capture by British or allied warships when outside neutral waters.

The plaintiffs were not entitled to recover for a constructive total loss; the adventure was frustrated, not by an insured peril, but by the voluntary act of the captain in taking refuge.

"It was self-restraint, not restraint of princes, that hindered the captain from putting to sea," Lord Sumner declared. "I do not say that he ought to have done otherwise, but the plain fact is that he could do as he liked."<sup>2</sup>

His action was voluntary; there was no duress, "no opportunity for saying that his will was not free, except upon grounds too theological to be worth pursuing."<sup>3</sup>

##### 5. Selecting "the Relevant Cause or Causes"

In a case where a shipowner was liable for loss or damage to goods, *however caused*, if his ship was unseaworthy when she began her voyage, and if, but for that unseaworthiness, the loss would not have happened, Lord Wright made important observations upon meaning of "cause": *Smith, Hogg Case*.<sup>4</sup>

<sup>1</sup> [1918] A.C. 101, 112, 113, 114, affirming [1916] 2 K.B. 156, and [1915] 3 K.B. 410, 415, a decision of Bailhache, J.: "An attempt to avoid capture is not the same thing as capture." See *per* Lord Dunedin (at 107, 108 of [1918] A.C.) for the American rule; *Queen Insurance Co. v. Globe Insurance Co.* (1923), 263 U.S. 487, *per* Holmes, J.

<sup>2</sup> [1918] A.C., at 111.

<sup>3</sup> *Ib.*, at 114. For the construction of causation in policies of insurance, Lord Sumner cites a decision of Lord Mansfield in *Jones v. Schmoll* (1785), 1 Term Rep. 130n, a policy in prime slaves, to pay for mortality by mutiny. Lord Mansfield did not allow the value of those slaves who chose death by fasting or died through despondency: "this is not a mortality by mutiny, but the reverse; for it is by failure of mutiny." See Broom, *Legal Maxims* (1939), 10th ed., 138-144.

<sup>4</sup> *Smith, Hogg & Co., Ltd. v. Black Sea, Baltic General Insurance Co., Ltd.* [1940] A.C. 997, 1003, 1004.

What event is a "relevant or decisive cause" varies with the case: "the selection of the relevant causes will generally vary with the nature of the contract."<sup>1</sup>

"There is always a combination of co-operating causes, out of which the law, employing its empirical or common-sense view of causation, will select the one or more which it finds material for its special purpose of deciding the particular case."<sup>2</sup>

In marine insurance, negligence causing the loss does not generally affect the right to recover. In carriage of goods by sea, the shipowner, apart from express exceptions, is generally liable for loss by negligence. Liability in marine insurance depends, "broadly speaking, on the casualty being caused directly by the happening which the contract stipulates to be the event on which the indemnity becomes exigible."<sup>3</sup> In marine insurance there may be—

"a competition of causes so that it is necessary to determine which event is the dominant cause."<sup>4</sup>

#### 6. *Scuttling, not a Peril of the Sea*

The loss of a ship by scuttling with the connivance of the owner is not a loss by "perils of the seas": *P. Samuel & Co. v. Dumas*.<sup>5</sup>

A special clause has since been inserted in cargo policies to ensure that innocent cargo owners should not suffer.

Bailhache, J., had found that the *Grigorios* was thrown away by the master and engineers and some of the crew, with the connivance of the owner. Water was deliberately let into the ship and a sham explosion was caused. The mortgagee, innocent of complicity, was entitled to recover.

This judgment was reversed by the Court of Appeal, who decided that loss by scuttling was *not* a loss by peril of the sea.<sup>6</sup> This decision the House of Lords (Lord Sumner dissenting) affirmed.

Was the "proximate cause" "the act of letting the water into the vessel or the actual inrush of the water," asked Viscount Cave.<sup>7</sup> Apart from authority, he felt no doubt that the former was the true view.<sup>8</sup> The scuttling was "the real and operative cause"; the entry of the sea water was *part of the effect*.<sup>9</sup> Thus also, Viscount Finlay:—

<sup>1</sup> [1940] A.C. 997, at 1003.

<sup>2</sup> *Ib.*, 1003, 1004. *Supra*, 320, note 2.

<sup>3</sup> *Ib.*, 1004.

<sup>4</sup> *Ib.*, 1006.

<sup>5</sup> [1924] A.C. 431; see Arnould, ss. 822 and 1283. He cites the rule as to onus of proof laid down by Branson, J., in *The Gloria* (1935), 54 Ll. L. Rep. 35, 50.

<sup>6</sup> *Ib.*, 447.

<sup>7</sup> [1923] 1 K.B. 592. See the judgment of Scrutton, L.J., at 618-620.

<sup>8</sup> [1924] A.C. 446.

<sup>9</sup> *Ib.*, 446, 447.

"The scuttling of this vessel occurred on the seas, but it was not due to any peril of the seas; it was due entirely to the fraudulent act of the owners. The scuttling was not fortuitous, but deliberate, and had nothing of the element of accident or casualty about it. Storms are 'fortuitous'; the ordinary action of the waves is not, and fraudulent scuttling is even more decisively out of the region of accident. The entrance of the sea water cannot for this purpose be separated from the act which caused it."<sup>1</sup>

Lord Sumner delivered weighty and ironical dissent.<sup>2</sup>

Neither negligence nor the liability to be indicted for manslaughter should affect the right of the owners to recover from the underwriters.<sup>3</sup> "An act has been intentionally done, which let in the water, as it might be expected to do, and the loss resulting from that act is a loss by perils of the sea."<sup>4</sup> It had been argued that a "peril on the sea" was not the same thing as a "peril of the sea." Lord Sumner agreed; "but in law epigrams only dazzle . . ."<sup>5</sup>

The interpretation of the term is now statutory.

"Perils of the seas refer to accidents or casualties of the seas, so, evidently, accident or casualty is the point of the definition. Fortuitous, probably, adds nothing to either substantive.

"A fortuitous casualty is a matter of chance, a mischance; but in causation there is no chance. The effect is caused, it does not happen . . . What difference does it make how the hole was made, by negligence or by crime, by impact of heavy cargo slipping from the slings, or contact with floating submerged wreckage? Given the hole and the water, nature does the rest . . . I do not see how it can be affirmed that the ship did not go to the bottom by getting too full of water, whether the owner let the water in at the beginning or not . . ."<sup>6</sup>

A ship is none the less burnt and destroyed by fire because the striking of the match was an act of arson."<sup>7</sup>

### 7. Scuttling by Hostile Action

When a ship is scuttled by order of the German Reich in consequence of hostilities, there is an actual total loss, which can be recovered as a loss by "enemies": *The Minden*.<sup>8</sup>

<sup>1</sup> [1924] A.C. 453, 454.

<sup>2</sup> *Ib.*, 460-483.

<sup>3</sup> *Ib.*, 462. See the examples given, where the difference in "frame of mind" may range from "conscious rectitude through panic and intoxication to crime" --the action is the same (at 463).

<sup>4</sup> *Ib.*, 463.

<sup>5</sup> *Ib.*, 464.

<sup>6</sup> *Ib.*, 465.

<sup>7</sup> *Ib.*, 466. If a scuttled ship is not proximately lost by perils of the sea, every cargo-owner losing goods is uninsured. Lord Sumner indicates the curious results that may follow (*ib.*, 473, 474). Lord Wright *Essays and Addresses*, 285, criticises the decision of the majority.

<sup>8</sup> [1942] A.C. 50.

## V. WAR RISKS AND PERILS OF THE SEA

### 1. *Warranted Free of Capture and Seizure*

A clause is usually inserted in a policy of marine insurance, relieving the underwriters from the consequences of "capture and seizure" of a ship. The "f.e. and s." clause runs thus:—

"Warranted free of capture, seizure, arrest, restraint, or detainment, and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after the declaration of war."<sup>1</sup>

The difference between "capture" and "seizure" is explained by Lord Fitzgerald in *Cory v. Burr* :

"'Capture' and 'seizure' do not mean the same thing. 'Capture' would seem properly to include every act of seizing or taking by an enemy or belligerent. 'Seizure' seems to be a larger term than 'capture' and goes beyond it and may reasonably be interpreted to embrace every act of taking forcible possession either by lawful authority or by overpowering force."<sup>2</sup>

The following rule applies, whether the facts point to capture, or to seizure :—

"Under a warranty to be free from capture or seizure, it matters not whether the act done be lawful or unlawful, whether by private individuals or by persons armed with State authority, the underwriter is not liable."<sup>3</sup>

### 2. *Restraint of Princes*

"The underwriter is liable for all loss occasioned by the public acts of his home Government in detaining, arresting or laying an embargo on the ship either in the home or a foreign port for any other cause than a violation of law, and it is immaterial whether the acts of the home Government are legal or illegal."<sup>4</sup>

In *Sanday's Case*,<sup>5</sup> British merchants shipped linseed on two British ships in the River Plate for carriage to Hamburg, having sold the linseed to German merchants, but retaining the property until delivery. They insured against, *inter alia*, "restraints

<sup>1</sup> Cited in Arnould, s. 905; McNair, 252. See also the judgment of Atkin, L.J., in *Britain Steamship Co. v. R.* [1919] 2 K.B. 670, 692-701.

<sup>2</sup> (1885), 8 App. Cas., 303, 405. Arnould, s. 829.

<sup>3</sup> Arnould, s. 905, citing *Robinson Gold Mining Co. v. Alliance Insurance Co.* [1904] A.C. 359.

<sup>4</sup> Arnould, s. 803. See (1945), 78 Ll. L. Rep. 240, 242.

<sup>5</sup> *Sanday v. British & Marine Foreign Insurance Co.* [1915] 2 K.B. 781, *per* Bailhache, J., at 787, and the Court of Appeal, at 808, *per* Lord Reading, C.J. (Swinfen Eady, L.J., dissenting). Affirmed [1916] 1 A.C. 650, *sub nom.* *British & Foreign Marine Insurance Co., Ltd. v. Sanday*. See McNair, 250-252.

and detainments of all kings, princes, etc." War broke out while the goods were at sea. The owners of one ship cabled to the master during the voyage and in pursuance of orders he put in at a British port. The other ship, on arriving in the Channel, was signalled by a French cruiser to go into a British port, which she did. The master there learned that war had begun. The further prosecution of the voyage, accordingly, became illegal. The ships discharged the goods at British ports and the merchants gave the insurance company notice of abandonment. They then sued upon the policies as for a constructive total loss, and were held entitled to recover.

The "proximate cause" of the loss was "restraint of princes," even though no force was used; "any authoritative prohibition on the part of a governing power, or the operation of municipal law, is sufficient," said Bailhache, J.,<sup>1</sup> referring to *Miller v. Law Accident Insurance Co.*<sup>2</sup> Restraint by the British Government is included, provided that this is "for any other cause than a violation of law."<sup>3</sup>

"A British subject does under a restraint clause in the present form insure himself against loss caused by a compliance with the law of his country or the commands of his Government, although he cannot and does not insure himself against a loss caused by a defiance of such law or commands."<sup>4</sup>

Now, a loss arising from steps *voluntarily taken* to avoid a peril, because of a blockade and for fear of capture, is *not* due to the peril: *Hadkinson v. Robinson*.<sup>5</sup> In the present case, however, "the restraint took the form of common law, which upon the outbreak of war sprang automatically into force, and of the commands issued by proclamation."<sup>6</sup>

"A shipowner who keeps his vessel at home or diverts her to a home port in obedience to such a proclamation is not taking steps to avoid that particular peril, but is submitting to its operation. In such a case restraint of princes is the proximate cause of loss."<sup>6</sup>

<sup>1</sup> [1915] 2 K.B. 781, 785.

<sup>2</sup> [1903] 1 K.B. 712, 721, 722. A decree of a foreign government, whereby the landing of cattle is prohibited, is a "restraint of princes or people." Mathew, L.J., said: "If actual force was not used it was because there was no opposition. The master submitted to the orders of the administration. The result to the assured was the same as if force had been used . . ." See Arnould, s. 807.

<sup>3</sup> [1916] 2 K.R., at 786-788, adopting Phillips, *Insurance*, 3rd ed., para. 1109.

<sup>4</sup> [1915] 2 K.B. 788.

<sup>5</sup> (1803), 3 Bos. & P. 388, 392: "The detention of the cargo on board the ship at a neutral port in consequence of the danger of entering the port of destination cannot create a total loss within the meaning of the policy, because it does not arise from a peril insured against": per Lord Alvanley, C.J. *Infra*, 326, 327.

<sup>6</sup> [1915] 2 K.B. 789; Arnould, s. 832 *et seq.*, Scrutton, art. 82.



In the Court of Appeal, Lord Reading, C.J., said :—

“ The term ‘ arrests, etc., of kings and princes and people ’ refers to political or executive acts . . . ”

Acts of State are “ clearly included ” ; a declaration of war is an Act of State :—

“ A political or executive act may, however, be an act of interference, and of forcible interference, notwithstanding that force is not actually exerted. The executive has the power of compelling obedience to its orders by the exercise of force if necessary, the force need not be actually physically present when the master of the vessel submits to an order of the executive. The master acts in obedience to such an order without requiring the exertion of force to coerce him into submission, because it would be useless to refuse to submit . . . It is not necessary that an actual exertion of force should be made to constitute a restraint.”<sup>1</sup>

Whether it was a legal or an illegal act, mattered not ; the captain was bound to obey the decree. The loss of the voyage was the direct consequence of the act of State, and, therefore, a loss by restraint of kings and princes.<sup>2</sup>

As a result of this case, Lloyd's underwriters devised the “ British and Allies Capture Clause 1916 ” :—

“ Warranted free of any claim arising from capture, seizure, arrest, restraint or detainment, except by the enemies of Great Britain or by the enemies of the country to which the assured or the ship belongs.”

In 1919 this clause became the following :—

“ Warranted free of any claim based upon loss of, or frustration of, the insured voyage or adventure, caused by arrests, restraints or detainments of kings, princes or peoples.”<sup>3</sup>

### 3. *Apprehension of Restraint*

“ The words ‘ restraint of princes ’ do not, in my opinion, extend to the apprehension of restraint. Such is neither the meaning of the words nor the sense of the clause ” : *Watts, Watts & Co., Ltd. v. Mitsui & Co., Ltd., per Lord Sumner*.<sup>1</sup>

In June, 1914, the defendants agreed to provide a steamer to proceed to the Sea of Azov, load sulphate of ammonia and carry it to Japan. The exceptions clause included restraint of princes. On 1st September the defendants declined to name a steamer, stating (as was not the fact) that the British Government had prohibited steamers from going to the Black Sea. The plaintiffs accepted this refusal as a repudiation. On 6th September, the Turkish Government closed the Dardanelles. The plaintiffs

<sup>1</sup> [1915] 2 K.B. 802.

<sup>2</sup> *Ib.*, 805.

<sup>3</sup> *McNair*, 252.

<sup>4</sup> [1917] A.C. 227, 245, affirming the Court of Appeal [1916] 2 K.B. 826, and *Bailhache, J.* [1916] 2 K.B. 830.

had already bought the sulphate of ammonia, and, being unable to procure a steamer, failed to take delivery, and the price of ammonia having fallen, paid their sellers £4,500 to be quit of this bargain. Bailhache, J., found that if a ship had been sent, the closing of the Dardanelles would have prevented her passage, but that the plaintiffs could, and would, have effected an insurance against sea and war risks on the value of the cargo at the port of destination. It was held that a reasonable apprehension of the closing of the Dardanelles, although justified, did not constitute a restraint of princes.

"Restraint of princes," said Lord Dunedin, "to fall within the exception, must be an existing fact and not a mere apprehension . . .

It would be useless to try to fix by definition the precise imminence of peril which would make the restraint a present fact as contrasted with a future fear. The circumstances in each particular case must be considered."<sup>1</sup>

If mere apprehension were a "restraint," this would lead, Lord Sumner observed, to the "interpolation of a period of suspense during which neither party could be certain of his rights . . ."<sup>2</sup>

#### 4. *Embargo by Country of Assured*

Where the assured and the underwriter are subjects of different States, the assured is not "identified" with the acts of his own Government, unless war between the two States renders the contract of indemnity unlawful: *Aubert v. Gray*.<sup>3</sup>

The headnote reads:—

"1. The clause in an ordinary policy of marine insurance on a ship and goods which insures against losses occasioned by 'arrests, restraints and detainments of all kings, princes and people, of what nation, condition or quality soever,' applies to a seizure of the ship in consequence of an embargo laid on her by the sovereign of the country of the assured, for the purpose of carrying on a war with another power . . .

2. There is a distinction in this respect between an embargo, in a time when there is peace between the countries of the insurer and the assured, laid on for a purpose wholly unconnected with hostility either existing or expected, and an embargo connected with such hostility."

The ship was restrained at Corunna by order of the Spanish Government, who, requiring them for transport, laid an embargo

<sup>1</sup> [1917] A.C. 238. See Campbell, 53-68.

<sup>2</sup> [1917] A.C. 248.

<sup>3</sup> (1862), 3 B. & S. 163, 169 (Exch. (Hamb.)). See argument at 177, 178 for American authorities, rejecting the doctrine in *Conway v. Gray* (1809), 10 East 536, overruled by the present case. See *Janson's Case* [1902] A.C. 484, 508.

on all vessels. The plaintiffs, who were Spaniards, sued upon a policy on goods by which they were insured, *inter alia*, against restraint of princes.

The defendant argued that the ship was restrained by the acts of the plaintiffs, on the fiction that every subject of every State consents to every act of the government of his State.

"The assertion," said Erle, C.J., "that the act of the Government is the act of each subject of that Government, is never really true. In representative governments it may have a partial semblance of truth, but in despotic governments it is without that semblance."<sup>1</sup>

#### 5. *Burden of Proof: Propositions of Bailhache, J.*

Where a ship is *missing*, and there is no direct evidence of the cause of the loss, the court draws the appropriate inference from the weather conditions, the experiences of other vessels and the presence or absence of local enemy activity: *Munro, Brice & Co. v. War Risks Association, Ltd.*<sup>2</sup>

The ship had never been heard of after she left; there was no suggestion that she struck a mine, or did so outside the danger area in which submarines were active. On the other hand, the weather was bad and the seas were high: the deck cargo was an added source of danger.

"I think she may have been (torpedoed)," said Bailhache, J., "but I cannot say she was. Equally I cannot say she was not. . . . Here all that can be proved is that a vessel is lost at sea. No one knows how; the loss falls upon the marine policy. The assured having proved that his vessel foundered at sea has proved a loss by peril of the sea, for in the last resort every vessel that sinks at sea is lost by a peril of the sea."

The plaintiff fails if, on the evidence, the probabilities are equally in favour of a loss by the perils insured against and a loss by other perils. It is not necessary for the assured to prove that his ship was not lost by the excepted causes.<sup>3</sup>

Bailhache, J., formulated five propositions for determining the burden of proof in similar cases:—

1. The plaintiff must prove such facts as bring him *prima facie* within the terms of the promise.

2. If the exceptions are not as wide as the promise, it is sufficient for the plaintiff to bring himself *prima facie* within the promise, leaving it to the defendant to prove that the plaintiff's case falls within the excluded exceptional class.

<sup>1</sup> 3 B. & S. 182. *Ned quaere*.

<sup>2</sup> [1918] 2 K.B. 78, 80, 81.

<sup>3</sup> *Ib.*, 88. Arnould, s. 905b. See *The Constantine Case* [1942] A.C. 154, *infra*.

3. Where the exception is as wide as the promise, a plaintiff cannot make out a *prima facie* case unless he brings himself within the promise as qualified.

4. It is a question of construction of the whole instrument whether the promise is a promise with exceptions or whether it is a qualified promise.<sup>1</sup>

5. A promise with exceptions can be converted by altering the language into a qualified promise; the form of the contract is immaterial.<sup>2</sup>

In another claim arising out of the same facts, the Court of Appeal held that both ship and cargo were lost through *war perils*: *Munro, Brice & Co. v. Marten*.<sup>3</sup>

#### 6. *Sailing without Lights on Mercantile Adventure*

Vessels which, engaged upon a peaceful mission, collide during war while navigating without lights, are *not* engaged in a "warlike operation."<sup>4</sup>

*The Petersham* was in service of the Admiralty (who took the risks of war) under a "T.99" charterparty.<sup>5</sup> While carrying iron from Bilbao to Glasgow she collided at night with a neutral steamship and sank: both vessels, under Admiralty regulations, were navigating without lights.

(a) Bailhache, J., said:—

"Sailing without lights at night was a precautionary measure to avoid submarine attacks imposed by the Admiralty upon all ships, just as was the taking an unusual course."<sup>6</sup>

(b) His decision was affirmed in *the Court of Appeal*.

The risk of collision, said Atkin, L.J., is an ordinary risk of a commercial venture. The present voyage was simply performed in war-time and under war conditions:

"It is an operation in war, but not a warlike operation." An increase of perils of the sea by reason of war does not convert those perils into perils of war.

"An omnibus is proceeding with dimmed lights in darkened streets in pursuance of Government orders made for the protection of a city and its inhabitants from attack by hostile

<sup>1</sup> Referring to the judgment of Palles, C.B., in *Gorman v. Hand-in-Hand Insurance Company*, I.R. 11 C.L. 224, 230.

<sup>2</sup> [1918] 2 K.B. 78, at 88, 89.

<sup>3</sup> [1920] 3 K.B. 94. See *The Braconbush* (1945), 78 Ll. L. Rep. 70.

<sup>4</sup> *Britain Steamship Co., Ltd. v. R.* [1919] 1 K.B. 575; affirmed [1919] 2 K.B. 670; [1921] 1 A.C. 99. See Arnould, s. 905c-f.

<sup>5</sup> One in which "marine risks were borne by the owners, but war risks by the Government." See *Admiralty Commissioners v. Sir R. Ropner & Co., Ltd.* (1917), 86 L.J.K.B. 1030, 1033, per Viscount Reading, C.J.

<sup>6</sup> [1919] 1 K.B. 581.

aircraft; is the omnibus engaged in a warlike operation? And if by reason of the lack of light it collides with a wayfarer or another omnibus, is the resulting injury the consequence of a warlike operation? And was the wayfarer similarly engaged in a warlike operation?"<sup>1</sup>

(c) *The House of Lords* dismissed the appeal.

"The sailing without lights," said Lord Shaw; "added to the quantum of that sea risk; . . . but . . . it did not convert the risk into one arising as a consequence of hostilities or warlike operations."<sup>2</sup>

Lord Sumner puts the point with characteristic incisiveness:

"The operation of *The Petersham* and the operation of *The Serra* were in each case peaceable; neither was doing anything warlike separately, nor were they doing anything warlike together. Nor again was the operation of those who issued the order warlike, though it was performed in time of war. It did not become a warlike operation merely because its object was to baulk warlike operations on the part of the enemy . . . The fact is that each of those ships was making a peaceful voyage under war-time conditions and no more. Historically it was due to the enemy's submarine campaign, but not as its proximate consequence."<sup>3</sup>

#### 7. *Sailing in Convoy on Mercantile Adventure*

If a merchant ship, sailing in convoy, strikes a reef and is lost, the proximate cause is *perils of the sea*, not a warlike operation. Sailing with convoy, if the convoy is attacked, may assume the character of a warlike operation: *The Matiana*.<sup>4</sup>

(a) *The Matiana*, coming home from Alexandria with a cargo of cotton and sailing under compulsory convoy, struck a reef in calm weather—in an area known to be dangerous—and became a total loss. The vessels had been zigzagging; the night was dark; they were on an unaccustomed course, and the currents were variable. The master, under orders of a King's officer, was not responsible for the course; neither was negligent. The vessel was insured both under an ordinary marine policy, containing the f.c. and s. clause, and under a war risks policy, covering "all consequences of hostilities or warlike operations by or against the King's enemies . . ."

<sup>1</sup> [1919] 2 K.B., at 696, 697.

<sup>2</sup> [1921] 1 A.C. 99, 122, 123.

<sup>3</sup> *Ib.*, 125.

<sup>4</sup> *British India Steam Navigation Co. v. Green* [1919] 1 K.B. 632, 636; [1919] 2 K.B. 670; [1921] 1 A.C. 99.

But for this decision, Scrutton, L.J., would have said that sailing in a convoy without lights at night was a warlike operation: *Glan Line Steamers, Ltd. v. Board of Trade* [1928] 2 K.B. 534, 568.

*Bailhache, J.*, held that the loss fell upon the war risks policy. To sail with convoy was a warlike operation: the assembling of the convoy, the voyage, the route and the precautions were all part of a "warlike operation." The stranding happened in the course of this operation to which it was directly due.

(b) *The Court of Appeal* reversed the judgment of the learned judge.<sup>1</sup>

Atkin, L.J., in his judgment in the *Petersham Case*, said:—

"I think that warlike operations connote the attributes of operations that form part of a series of acts of war, belligerent acts by combatant forces, whether offensive or defensive."

The risk of collision is an ordinary risk of a commercial adventure.

"'Hostilities' imply nations at war with one another. Warlike operations are included in the word 'hostilities,' but may range outside it; as, for instance . . . where national territory is being protected in anticipation of war by defensive methods appropriate to war, that is to say, by laying down mines. I do not think that warlike operations need be directed to the immediate hurt of the enemy; I incline to think that during war almost any action or movement of the combatant forces in the course of their combatant duties while exercised in the area of war could be included."<sup>2</sup>

It was fallacious to identify the escorted merchant ships with the escorting warships.

"The warships are engaged in the warlike operation of protecting non-combatant vessels from the enemy. The merchant vessels are engaged in the peace-like operations of conveying merchandise by sea. The sheep are not the shepherd; and are not engaged in the operation of shepherding."<sup>3</sup>

The loss was caused by an ordinary sea peril, i.e., stranding:—

"That she struck a reef was a mischance. It could not be calculated. It was not proximately caused by the order. It was precisely the kind of mischance that constitutes a marine peril when voyaging on an unknown or uncharted route . . . the true result of the order was thereby to expose the ship to a greater chance of suffering a loss from marine peril."<sup>4</sup>

"A naval order to incur marine risks by taking a dangerous channel, by sailing in a fog-bound area, by navigating at full speed, or, as in the last case, without lights, does not proximately cause the loss, if in fact the vessel suffers loss from collision or stranding."<sup>5</sup>

<sup>1</sup> [1919] 2 K.B. 670.

<sup>2</sup> *Ib.*, 695.

<sup>3</sup> *Ib.*, 698.

<sup>4</sup> *Ib.*, 699.

<sup>5</sup> *Ib.*, 700, 701.

(c) *The House of Lords, by a majority, affirmed the decision.*<sup>1</sup> Lord Sumner, with ruthless logic, declared :—

“Sailing with convoy is only sailing in company and is no more a warlike operation than sailing alone . . . Not everything done by a King’s ship, or a King’s officer, in time of war is necessarily a warlike operation or the consequence thereof.”<sup>2</sup>

To sail in convoy, Lord Wrenbury observed, is to increase the maritime risk of collision ; there is no new risk : the object is “to give greater security to peaceful operations.” To sail in convoy is “an operation adopted in time of war, but this does not . . . make it a warlike operation . . . a precautionary measure is not in itself a measure of defence.”<sup>3</sup>

“If it becomes necessary to use the weapon of precaution, no doubt a defence may commence. Thus, if submarines had been sighted and the escorting vessel had ordered a notoriously dangerous course in order to avoid a peril of war—namely submarine attack—and, in consequence, a vessel had gone on the rocks, the case would, I think, have been different.”

Moreover, even if sailing in convoy were a warlike operation, how did the loss result *in consequence of* that operation ?

“The ship went on the reef not because she was in convoy . . . but because she did not know where she was and did not know of the danger.”<sup>4</sup>

#### 8. *Destroyer Patrolling for Submarines*

Where a destroyer, on patrol and looking out for submarines, in the act of turning at the end of her beat struck and sank a requisitioned merchantman on a dark night, both vessels sailing without lights and neither being to blame, the collision was the direct consequence of a warlike operation : *The Ardgantock*.<sup>5</sup>

In the Court of Appeal, Atkin, L.J., said :—

“The injury to the *Ardgantock* was proximately caused by the impact of the war vessel moving in the course of its warlike operations. It seems to me unnecessary to consider whether the *Ardgantock* was sailing without lights by reason of her being engaged in a warlike operation or by reason of her being engaged in a peaceful operation. The injury was directly due to the warlike operation of the *Tartar*, just as it

<sup>1</sup> [1921] 1 A.C. 99. Lords Atkinson, Sumner and Wrenbury ; Viscount Cave and Lord Shaw of Dunfermline, dissenting. Viscount Cave said that the loss was the direct result of the orders which were “a part of the conveying operation” ; the transaction could not be “split up” (at 110, 111). Lord Shaw observed that the merchant captain and officers were no longer in control ; the orders were “clothed with the instant sanction of force” (at 124). All the ships were under a unified command which was a military operation.

<sup>2</sup> *Ib.*, 129.

<sup>3</sup> *Ib.*, 135, 136.

<sup>4</sup> *Ib.*, 136.

<sup>5</sup> *Attorney-General v. Ard Coasters. Ltd.* [1921] 2 A.C. 141.

would have been in my view if the *Tartar* had been herself injured by running into an unlighted wreck or other peril of the same kind."<sup>1</sup>

Lord Dunedin put the case in the form of a syllogism :—

"Patrolling for submarines is a warlike operation. The *Tartar* was engaged in such patrolling. In the course of that operation, and while engaged in it, she ran into the *Ardgantock*. The collision is therefore the consequence of a warlike operation."<sup>2</sup>

### 9. Warship Proceeding to Pick up Convoy

Where a warship, while proceeding to pick up a convoy, collided on a dark night with a merchant ship sailing in convoy, both vessels sailing without lights and neither being to blame, the warship at the time of collision was engaged on a warlike operation which was the direct cause of the damage: *The Richard de Larrinaga*.<sup>3</sup>

Bailhache, J., said :—

"I think that when one of His Majesty's ships is proceeding to her station to take up her duties as a convoying ship she is engaged on a warlike operation."<sup>4</sup>

And Viscount Finlay declared :—

"Protecting convoys is a form of warlike operation, it is an operation in the course of war necessary to be performed by war vessels for the purpose of protecting the merchantmen. I cannot separate the proceeding under orders to the spot where the duty is to be discharged from the actual discharge of the duty itself; both form part of the warlike operation. It is just as much a part of a warlike operation to get your ships or your troops to the spot where a thing is to be done as it is to do it when you get to the spot."<sup>5</sup>

Lord Dunedin, with characteristic precision, observed :—

"I think the *Matiana Case* was a clear decision to the effect that the escorting ship of a convoy is engaged in a warlike operation—the escorted ship is not . . . The *Devonshire* was not actually the escorting ship, and she was not actually convoying, but she was on a voyage to pick up a convoy; her commission to convoy covered her proceeding to the place where she was to pick up the convoy, and accordingly I think

<sup>1</sup> [1920] 3 K.B. 65, 78, cited at 147, 148 of [1921] 2 A.C. by Viscount Finlay.

<sup>2</sup> *Ib.*, 152. In *The Corwood* [1942] A.C. 691, 697 Viscount Simon, L.C., thought that this passage contained "a slip in reasoning" if it meant that *anything* happening during a warlike operation is a consequence of it.

<sup>3</sup> *Liverpool & London War Risks Insurance Association, Ltd. v. Marine Underwriters of S.S. Richard de Larrinaga* [1921] 2 A.C. 141.

<sup>4</sup> [1920] 1 K.B. 705, cited by Viscount Finlay, at 151 of [1921] 2 A.C.

<sup>5</sup> *Ib.*, 151, 152.



it comes within the decision in the *Matiana Case* that she was engaged in warlike operations."<sup>1</sup>

#### 10. *Transport of War Material from one War Base to another*

Where a merchantman, under requisition but carrying general cargo, was run down and sunk in the Mediterranean by another merchantman requisitioned but *carrying ambulance wagons and Government stores from one war base (Mudros) to another (Alexandria)*, both ships sailing under orders, at full speed and without lights to avoid submarines, and neither being to blame, the latter ship was engaged on a warlike operation of which the loss was a direct consequence: *The Geelong*.<sup>2</sup>

The collision between the *Geelong* (carrying cargo) and the *Bonvilston* (carrying Government stores) happened on 1st January, 1916, and the Court of Appeal took judicial notice of the evacuation from Gallipoli, of Mudros as the advanced base for Gallipoli, and of Alexandria as the base for the Palestine and Salonika operations.<sup>3</sup> Scrutton, L.J. (following Bailhache, J<sup>4</sup>), said that carrying ambulance wagons and Government stores from one war base to another in time of war, was a warlike operation.<sup>5</sup>

The House of Lords held that no judicial notice may be taken of "the date of a particular event, in a modern war," but affirmed the decision that the loss was caused by a warlike operation.

Viscount Cave, L.C., declined to define "warlike operations": "Plainly, it does not include all operations in war, or even all operations for the purposes of war."<sup>6</sup> The *Petersham*, carrying iron ore for the making of munitions, and the *Matiana*, carrying

<sup>1</sup> [1920] K.B., at 152, 153.

<sup>2</sup> *Commonwealth Shipping Representative v. Peninsular & Oriental Branch Service* [1923] A.C. 191, affirming [1922] 1 K.B. 706, 713 *et seq.*, affirming an order of Bailhache, J., *ib.*, 709, 710.

<sup>3</sup> *Ib.*, 716, 718, *per* Warrington and Scrutton, L.JJ. *Supra*, 2.

<sup>4</sup> *Ib.*, 710.

<sup>5</sup> *Ib.*, 718.

<sup>6</sup> [1923] A.C. 191, 197. See also *per* Lord Dunedin, *ib.*, 205. And see upon judicial notice *per* Lord Sumner, at 211: "to require that a judge should affect a cloistered aloofness from facts that every other man in court is fully aware of, and should insist on having proof of what, as a man of the world, he knows already better than any witness can tell him, is a rule that may easily become pedantic and futile. Least of all would it be possible to require this detached and blindfold attitude towards events which the course of the late war has burnt into the memories of us all. It does not, however, seem to me . . . that the month and day at or about which a particular military movement was carried out . . . are matters . . . of which judges can be required to take judicial notice . . ."

See, however, *per* Lord Wright (distinguishing this case), in *The Conservas Case* [1944] A.C. 6, 13; in a prize court the judge may act upon "matters of common notoriety," e.g., that Genoa was a war base of supplies in Italy, or the devices used to cover the conveyance of contraband to an enemy destination. He cited an observation of Lord Stowell in *The Rosalie and Betty* (1800), 2 C. Rob. 343, 344; judges of prize courts "are not to shut their eyes to what is generally passing in the world, . . . not to consider them at all, would not be to do justice."

cotton possibly for the making of clothing for troops, were not engaged in warlike operations.<sup>1</sup> On the other hand, the term is not confined to "actual combatant operations against the enemy, whether by way of attack or defence."<sup>2</sup>

"Probably the phrase includes all those operations of a belligerent power or its agents which form part of or directly lead up to those processes of attack and defence which are of the essence of war."

The transfer of combatant forces from one war base to another is a warlike operation; thus also, the similar transport of munitions of war. Nor is there any distinction between munitions and "the materials for equipping a fighting force, such as saddles for the cavalry, field kitchens for the infantry, or ambulance wagons for the wounded in battle."<sup>3</sup>

Lord Sumner observed that had this been the first case of its kind, it might have been difficult to say that "the operation" (*sc.* of the *Geelong*), was "warlike,"

"for in itself it was peaceful enough. It was unaggressive, it was unobtrusive, not to say furtive; and the *Bonvilston* would have behaved in exactly the same way, if she had been carrying purely a commercial cargo between exclusively mercantile ports."<sup>4</sup>

"Warlike operations," he continued, "is an expression deliberately wide and incidentally rather vague, but it has been held that a mere operation during war is not warlike, if it is not also an operation of war."<sup>5</sup>

"War base" is an administrative term and means, in practice, "simply the place chosen by the competent military authority, on which to base other operations of war. A place is, therefore, not a war base because nature made it so or owing to the fitness of things, but because those directing the war chose it for that purpose."<sup>5</sup>

### 11. *Category of Risk, Unaffected by Negligence*

When a ship, engaged on a warlike operation, collides with another ship,

"the category of war risk cannot be changed into the category of sea risk by reason of the negligence of those engaged in conducting those operations": *The Warilda*, *per* Lord Shaw.<sup>6</sup>

*The Warilda*, requisitioned under the terms of charterparty T.99, and used as an ambulance, was armed; if attacked by a submarine, the master was instructed to ram the submarine. While carrying wounded from Havre to Southampton, and by

<sup>1</sup> *Britain Steamship Co. v. R.* [1921] 1 A.C. 99.

<sup>2</sup> [1923] A.C. 199.

<sup>3</sup> *Ib.*, 199.

<sup>4</sup> *Ib.*, 208.

<sup>5</sup> *Ib.*, 209.

<sup>6</sup> *Adelaide Steamship Co. v. R.* [1923] A.C. 292, 300; affirming [1923] 1 K.B. 59; judgment of McCordie, J. (at 63-66), reversed.

Admiralty order proceeding full speed and without lights, she negligently collided with a British steamer and was injured.

"The negligent conduct of warlike operations is a risk of war and is one of the risks intended to be covered by this particular case."<sup>1</sup>

Atkin, L.J., reserved the case where loss was caused by negligence not of the war vessel but of the merchant vessel.

Lord Shaw said :—

"The conduct may have been faulty, but it was a warlike operation, though faultily conducted . . . Once the category of warlike operations attaches to the movements of the vessel, that category must continue to attach, although those movements had an element of negligence in their operations."<sup>2</sup>

*The Warilda's* operation, Lord Sumner said, was a warlike operation throughout :

"as was the whole so were the parts. Steaming into the *Petingaudet* was one of those parts, and none the less so, whether it was due to mere misfortune, to error of judgment, or to negligent navigation. Had it been done wilfully the case might be different."<sup>3</sup>

Negligence is a "quality of the navigation," not a "distinct operation."<sup>3</sup> Lord Sumner proceeds to state a principle which has been reaffirmed in the House of Lords<sup>4</sup> :

"When damage is done by two ships coming into collision, one being engaged in a warlike operation, and the other on an ordinary commercial voyage, the collision is a risk falling on the marine policy, unless it is taken out of it by being proved to be caused by warlike operations, and this proof fails when it is shown to be caused by the action of the officer in charge of the commercial operation, all the more so if his action is negligent and blameworthy ; but I think the result would be the same if his action was only an error of judgment or wrong but excusable in what is called the agony of the moment, so long as it is his action that causes the collision effectively and proximately, for the ship engaged in the warlike operation may play a minor part, since it takes two to make a collision."<sup>5</sup>

The key to the problem is that in *collision* cases, where the question is, who is to blame, negligence is *material* ; in *insurance* cases where the question is, has the event happened, negligence is only "*evidentiary*."<sup>6</sup>

Lord Wrenbury concisely declared :—

"The negligence does not alter the character of the sea peril, which still remains the *causa proxima*. So, if I insure

<sup>1</sup> [1923] 1 K.B., at 77, *per* Atkin, L.J.

<sup>2</sup> [1923] A.C., at 300.

<sup>3</sup> *Ib.*, at 301.

<sup>4</sup> See *per* Lord Hailsham, L.C., and Lord Warrington in *The Clan Matheson* [1929] A.C. 514, 525, 533.

<sup>5</sup> [1923] A.C., at 305.

<sup>6</sup> *Ib.*, 305, 306.

my house against fire, or my carriage or car against road risks, the risk that my servant may negligently set the house on fire, or that my driver may drive negligently and cause a collision, is exactly one of the risks against which I sought insurance. I insured against fire or collision. The fire or collision occurred and the insurance office is to bear that risk to my indemnity. The fire or the collision is the *causa proxima* of the loss—the negligence is a cause more remote.”<sup>1</sup>

## 12. Mineplanter, during Armistice, Carrying Mine

Where a ship carrying a cargo of oats *during the armistice*, collided with a *mineplanter carrying mines*, both vessels being equally to blame, negligence did not prevent the collision from being a consequence of a warlike operation: *The Trevanion*.<sup>2</sup>

The collision occurred on 25th December, 1918, between *The Trevanion*, under requisition and proceeding from the United States to England, and *The Roanoke*, employed by the United States Navy and proceeding from England to the United States carrying back mines belonging to that navy—perhaps in the belief that the war was coming to an end.<sup>3</sup> There was no evidence of the purposes for which the mines were being carried. Rowlatt, J., held that hostilities having ended, the *Roanoke* was not engaged in hostilities.<sup>4</sup> This order was reversed by the Court of Appeal. Scrutton, L.J., said:—

“if a loss is equally caused by two risks or perils, the person insuring or bearing the risk of one of those perils, is not relieved because another peril which he did not insure or bear the risk of equally contributes to the loss.”<sup>5</sup>

Of the Armistice: that

“did not suspend operations of war: the blockade continued, and any German ships at sea were liable to capture; vessels carrying contraband were captured and condemned by the Prize Court.”<sup>6</sup>

After quoting Viscount Cave's definition, in *The Geelong*, of “warlike operations,”<sup>7</sup>—which he would amend to read

<sup>1</sup> [1923] A.C., at 308.

<sup>2</sup> *Board of Trade v. Hain Steamship Co., Ltd.* [1929] A.C. 534, affirming the decision of the Court of Appeal [1928] 2 K.B. 534, who had reversed an order of Rowlatt, J., *ib.*

<sup>3</sup> See *per* Scrutton, L.J. [1928] 2 K.B., at 543.

<sup>4</sup> [1928] 2 K.B., at 536. See the relevant terms of the Armistice, set out *ib.*

<sup>5</sup> [1928] 2 K.B., at 542, quoting the judgment of Lindley, L.J., in *Reischer v. Borwick* [1894] 2 Q.B. 548, 551, approved in *The Leyland Case* [1918] A.C. 350.

<sup>6</sup> [1928] 2 K.B., at 543. By clause xxxiv, the duration of the Armistice was thirty-six days, with option to extend. On failure of execution of any of the clauses, it might be repudiated on forty-eight hours' notice (*ib.*, at 536, 543).

See *The Rannveig* [1922] 1 A.C. 97, 104, *per* Lord Sumner; *supra*, 20, 21.

<sup>7</sup> [1923] A.C. 191, 199.

"all those operations . . . pertaining to or directly connected with the war," Scrutton, L.J., continued :—

"Marching down the hill under the command of the Duke of York was as much a warlike operation as the march up ; and when Johnny came marching home again, he was engaged, in my opinion, on as warlike an operation as when he marched out."<sup>1</sup>

This decision the House of Lords affirmed.

Viscount Sumner said that "the temporary cessation of hostilities, which is all that an armistice in itself involves," could not deprive the operation of carrying mines of its warlike character.<sup>2</sup>

### 13. Collision through Defective Steering Gear

Where a requisitioned steamship, sailing at night in convoy without lights, steered off her course because her *steering gear suddenly broke down*, and was struck and sunk by a ship engaged on a warlike operation, neither vessel being to blame, the collision was *not* a consequence of a warlike operation : *The Clan Matheson*.<sup>3</sup>

*The Clan Matheson* had sailed from New York for Nantes, then a war base, but also an ordinary commercial port, with a cargo, 84 per cent. of which was barley and oats for the civil commissariat, and 16 per cent. steel for shells. *The Western Front*, under charter to the United States Government, was carrying a cargo of war supplies for that Government to St. Nazaire, a war base. Wright, J., held that the loss was due to the "fortuitous motion" of *The Clan Matheson* ; *the Western Front* was "the instrument, but not the cause, of the loss."<sup>4</sup>

The Court of Appeal affirmed this decision.

Scrutton, L.J., put the following case in argument :—

"Suppose a warship anchors, and a merchant ship's steering gear breaks down and she runs into the warship. Is the collision a consequence of a warlike operation ?"<sup>5</sup>

The "proximate, dominant and direct cause" of the loss was the break-down of the steering gear of *The Clan Matheson* and her subsequent steering.<sup>6</sup> Greer, L.J., dissented, thinking that the cause of the collision was the action of the war vessel coming into contact with the other vessel without her fault.<sup>7</sup>

<sup>1</sup> [1928] 2 K.B., at 544. See also at 547, 548, *per Lawrence*, L.J.

<sup>2</sup> [1929] A.C., at 541.

<sup>3</sup> *Clan Line Steamers, Ltd. v. Board of Trade* [1929] A.C. 514, affirming the decision of the Court of Appeal [1928] 2 K.B. 557 (Greer, L.J., dissenting), affirming an order of Wright, J.

<sup>4</sup> [1928] 2 K.B., at 561.

<sup>5</sup> *Ib.*, at 565, and in the judgment (at 571).

<sup>6</sup> *Ib.*, at 572.

<sup>7</sup> *Ib.*, at 577.

The House of Lords affirmed the decision of the Court of Appeal. Viscount Sumner pointed out that the collision had become inevitable before the impact; *The Clan Matheson* had become "irretrievably a loss by a marine peril before the collision happened, and the character of the object with which she collided was a pure incident. If it had not been the *Western Front* it would have been some other ship."<sup>1</sup>

A ship or cargo "physically untouched," may be "so affected by" a peril, as to be lost by it, although "disappearance or dissolution" only come later. "This peril, having 'begun to operate' and there being no escape, is held then to be the proximate cause."<sup>2</sup> *The Clan Matheson* was a "lost ship" before the impact; the subsequent events only determine "the mode and measure of a loss, already caused *aliunde*."<sup>3</sup>

## VI. DECISIONS DURING PRESENT WAR

### 1. "Proximate Cause" Restated

Where a requisitioned ship engaged on a warlike operation and sailing in convoy, becomes stranded without negligent navigation owing to a variety of causes including deviation under orders and an unexplained tidal set, the proximate cause is a warlike operation: *The Corwold*.<sup>4</sup>

The *Corwold* was requisitioned in September, 1939, on terms of the charterparty T.99A and T.773; risks of war—including "the consequences of hostilities or warlike operations"—were taken by the Minister. In May, 1940, carrying petrol from Greenock to Narvik for His Majesty's forces, in a convoy of merchantmen, under naval orders and guarded by destroyers, she stranded near the Damsel Rocks on the west of the Isle of Skye. The convoy had zigzagged and deviated during a dark night of squalls to avoid what was thought to be an enemy submarine. She turned at right angles to her normal course and continued in this direction for half an hour.<sup>5</sup> Having lost her leading ship, and while attempting to pick up the convoy, she grounded.

Sir Robert Aske, K.C., the arbitrator, found no improper navigation, but that "an unexpected and unexplained tidal set" carried the *Corwold* eastward. Through fog, the absence of the Neist Light, and poor visibility, this set could not be detected. Nothing could indicate that the vessel was not on a

<sup>1</sup> [1921] A.C., at 527, 528.

<sup>2</sup> *Ib.*, at 528. Viscount Sumner refers to Erle, C.J.'s illustration in the *Ionides* Case of a ship becoming embayed on a lee shore while flying from captors: (1863), 14 C.B. (n.s.) 259, 280.

<sup>3</sup> [1929] A.C., at 529.

<sup>4</sup> *Yorkshire Dale Steamship Co. v. Minister of War Transport* [1942] A.C. 691.

<sup>5</sup> *Per* Viscount Simon, L.C., *ib.*, at 700.

safe course ; the stranding was not due to negligence. The loss, he found, was the direct consequence of the warlike operation.

Viscount Caldecote, C.J., held that the stranding was a loss by war peril and that the intervention of the set of the tide did not prevent the war risk from attaching.<sup>1</sup>

The Court of Appeal reversed this decision,<sup>2</sup> holding that the loss was caused by a marine risk and that there was no chain of causation between the warlike operation and the stranding.

Loss by going aground, *prima facie*, is proximately caused by perils of the sea. In argument, MacKinnon, L.J., put this suggestion : " Suppose on this voyage she met very bad weather, and the violence of the waves carried away her bridge, would that not be a loss by perils of the seas, and could you contend that it was a consequence of warlike operations ? " Counsel replied that it would be such a loss.<sup>3</sup> It is not necessary, however, continued MacKinnon, L.J., to prove any " catastrophic disaster " : a fortuitous accident may occur without catastrophe or violence.<sup>4</sup> The clause in the policy does not say " No loss shall be recoverable while the vessel is engaged on a warlike operation."<sup>5</sup>

The House of Lords reversed this decision.

(a) There was no finding, said *Viscount Simon, L.C.*, that the tidal set was the proximate cause of the stranding. The *effective explanation* of the disaster, in the arbitrator's view, was the *combination* with the tidal set of the *alteration of course*.<sup>6</sup>

As Lord Porter, summarising the facts, observed :—

" One must, I think, take the whole story—a ship sailing on a warlike operation at speed in dangerous waters where unexpected currents might be found, in convoy, without lights, following an ordered course and deviating from it again under orders to avoid actual or imagined submarine attack. I do not think that any one of these factors can be neglected in arriving at the cause of the loss."<sup>7</sup>

If the *Coxwold* had been on " an ordinary mercantile voyage," the risk would be a marine one ;

" but, in the circumstances, the cause of the *Coxwold* being in that place, at that time, in those conditions, was her warlike operation and the loss was, in my view, not only in the course of but caused by that operation."<sup>8</sup>

The relevant contrast, the Lord Chancellor pointed out, was not between marine risks and war risks. The question was not whether this stranding was a marine risk, but whether it was

<sup>1</sup> (1941), 2 All E.R. 776, 781.

<sup>2</sup> [1942] 1 K.B. 35.

<sup>3</sup> *Ib.*, at 45. Approved by Lord Wright in [1942] A.C., at 713.

<sup>4</sup> *Ib.*, at 45.

<sup>5</sup> *Ib.*, at 46.

<sup>6</sup> [1942] A.C. 691, at 696. See *Note* by C. K. A. (1943), 59 L.Q.R. 6, 7.

<sup>7</sup> *Ib.*, at 720.

not to be regarded as "the consequence of warlike operations."<sup>1</sup> "That . . . depends on whether . . . the 'dominant' or 'determining' cause of the disaster was warlike operations. The interpretation to be applied does not involve any metaphysical or scientific view of causation. Most results are brought about by a combination of causes, and a search for 'the cause' involves a selection of the governing explanation in each case."<sup>2</sup>

The truth lies between two propositions neither of which is itself correct. Everything that happens to a ship while engaged on a warlike operation is not caused proximately by a warlike operation. Nor is it true that an accident arising from a marine risk (e.g., stranding or collision) can in no circumstances be the consequence of a warlike operation.<sup>3</sup> Viscount Simon continues :

"It seems to me that there is no abstract proposition, the application of which will provide the answer in every case, except this : one has to ask oneself what was the effective and predominant cause of the accident that happened, whatever the nature of that accident may be. It is well settled that a marine risk does not become a war risk merely because the conditions of war may make it more probable that the marine risk will operate and a loss will be caused. It is for this reason that sailing without lights, or sailing in convoy, are regarded as circumstances which do not in themselves convert marine risks into war risks, but where the facts, as found by the judge, establish that the operation of a war peril is the 'proximate' cause of the loss in the above sense, then the conclusion that the loss is due to war risk follows."<sup>3</sup>

Where the operation creates no "new risk," but only "aggravates an existing maritime risk," the risk is not a war risk. But if, to avoid submarine attack, the escorting vessel orders a "notoriously dangerous course," the case is different.<sup>4</sup>

(b) *Lord Atkin* appears to go further than Viscount Simon :—

"If the warlike operation includes the direction of the war vessel through the water from one war starting point to another war destination, it seems to remain true that almost every casualty to a ship during such an operation will be the consequence of a war operation.<sup>5</sup> Not all, for there may be

<sup>1</sup> [1942] A.C., at 697.

<sup>2</sup> *Ib.*, at 697, 698.

<sup>3</sup> *Ib.*, at 698.

<sup>4</sup> See Lord Wrenbury's observations in *The Matiana Case* [1921] 1 A.C. 99, 136, quoted [1942] A.C., at 699.

<sup>5</sup> Following his observations, when Atkin, L.J., in *The Petersham* [1919] 2 K.B. 670, 695 : "I incline to think that during war almost any action or movement of the combatant forces in the course of their combatant duties, while engaged in the area of war, could be included." Bailhache, J., and Lord Parmoor accepted this view in *The Larrinaga Case* [1920] 1 K.B. 700, 706 ; [1921] 2 A.C. 141, 154. And see per Lord Wright [1942] A.C., at 703, and Lord Porter, *ib.*, at 719. See also, per Viscount Cave, L.C., in *The Geelong* [1923] A.C. 191, 199 : "Probably



circumstances of accident on board or the result of wind and wave that may not come within the definition, though I should find it necessary to know all the facts relating to a suggested accidental fire or a suggested great wave before I was able to draw the line. But if in the course of a warlike operation the direction of the ship's course against another ship is a consequence of a warlike operation : *Attorney-General v. Ard Coasters, Ltd.*,<sup>1</sup> it is surely impossible to distinguish the case where the course of the ship is directed against a rock and this whether negligently or without negligence, and whether the ship is deflected by tide or current or wind."<sup>2</sup> The change of course was not the "determining factor."

(c) *Lord Macmillan* felicitously remarks :—

"No formula can be devised which will provide a universal touchstone for the infinite variety of circumstances which may arise. Each case must be judged in the light of its own facts and by resorting, not to the refinements of the philosophical doctrine of causation, but to the commonplace tests which the ordinary business man conversant with such matters would adopt."<sup>3</sup>

Stranding—a "typical marine casualty"—may also be proximately caused by warlike operations :—

"A peril may be at once a maritime peril and a war peril."<sup>3</sup>

On the facts the arbitrator's finding was justified :—

"I think that the ordinary man, if asked what caused the casualty, would reply that it was caused by the vessel, in obedience to orders from the commodore of the convoy, deviating from a safe course in order to avoid a suspected enemy submarine."<sup>4</sup>

(d) *Lord Wright*, analysing the authorities in evolutionary sequence, begins by observing (as *Lord Atkin* had said) that "*prima facie* it would have seemed to me, if the damage was caused by the action of the vessel in executing a warlike operation, it should on the decisions of this House be classed as a consequence of a warlike operation."<sup>5</sup>

"Warlike operation" comprehends a variety of operations :—

"The warlike operation is, as it were, an umbrella which covers every active step taken to carry it out, including the

the phrase includes all those operations of a belligerent Power or its agents which form part of or directly lead up to those processes of attack and defence which are of the essence of war": cf. the syllogism of *Lord Dunedin*, in *Attorney-General v. Ard Coasters, Ltd.* [1921] 2 A.C. 141, 152, which, unqualified, Viscount Simon does not accept. See also, *The Clan Stuart* [1943] 1 K.B. 209, *infra*, 348.

<sup>1</sup> [1921] 2 A.C. 141.

<sup>2</sup> [1942] A.C., at 701.

<sup>3</sup> [1942] A.C., at 702.

<sup>4</sup> *Ib.*, 703: cf. the same criterion used by *Lord Dunedin*, *The Leyland Case* [1918] A.C. 350, at 364; *supra*, 319, 320.

<sup>5</sup> *Ib.*, 704.

navigation, the course and helm action intended to bring the vessel to the position required by the warlike operation, and that none the less because accident or mischance or negligence leads to stranding or collision."<sup>1</sup>

"The essential feature" of the present case<sup>2</sup> was that the impact with the rock resulted from a direction given in pursuance of a warlike operation.

Of the "powerful arguments" of the Court of Appeal, Lord Wright observes that they are "worthy of the most careful consideration, unless they are advanced too late, because, excluded as I think they are, by the line of reasoning pursued in the authorities . . ." He declares:—

"there is necessarily involved a process of selection from among the co-operating causes to find what is the proximate cause in the particular case."<sup>3</sup>

He cites with approval from Phillips on Insurance:—

"In case of the concurrence of different causes to one of which it is necessary [*sc.* because of the nature of the contract] to attribute the loss, it is to be attributed to the *efficient predominating peril* whether it is or is not in activity at the consummation of the disaster."<sup>4</sup>

Lord Wright continues:—

"This choice of the real or efficient cause from out of the whole complex of the facts must be made by applying common-sense standards. *Causation is to be understood as the man in the street, and not as either the scientist, or the metaphysician, would understand it.* Cause here means what a business or seafaring man would take to be the cause without too microscopic analysis but on a broad view . . . The question always is what is *the* cause, not merely what is *a* cause. The cause must then be within the description of 'consequences of warlike operations' if the shipowner is to recover."<sup>5</sup>

The stranding was undoubtedly a peril of the sea, but was "the cause of the casualty" a consequence of warlike operations?

On the one hand, the hostilities or warlike operations may be the action of the enemy, seeking to capture or to damage or destroy the merchant ships, or operations resulting from attempts to capture. On the other hand, the casualty may be due to "the acts of the national or allied armed forces,"<sup>6</sup> e.g., being run down, though accidentally, by a friendly warship. Such a loss has been regarded in the authorities as a loss by warlike

<sup>1</sup> [1942] A.C., at 704.

<sup>2</sup> *Ib.*, 705.

<sup>3</sup> *Ib.*, 706.

<sup>4</sup> (1867), 5th ed., Cambridge, Mass., 678; cited *ib.*, at 706, author's italics.

<sup>5</sup> [1942] A.C. 706, 707. Author's italics in second sentence. See, also, *per* Cardozo, J., in *Bird v. St. Paul Fire and Marine Insurance Company* (1918), 224 N.Y. 47, cited *supra*, 320, note 2.

<sup>6</sup> *Ib.*, 708.

operations. The scope of the words has been further extended : a merchant ship, carrying troops or military equipment to or from a theatre of war, " may be regarded *pro hac vice* as serving the belligerent purposes of the country and as taking her share in hostilities against the enemy " ; she is engaged on a " warlike operation."<sup>1</sup> If, in executing this warlike operation, she is lost or damaged or damages other vessels, the loss or damage is the consequence of the warlike operation.<sup>1</sup>

Lord Wright proceeds to trace the meaning of the words in the decisions of the House of Lords after the last war.<sup>2</sup>

In *The Petersham*,<sup>3</sup> sailing without lights, it was unsuccessfully urged, involved an *extra peril* which was a consequence of hostilities or warlike operations. *The Matiana*<sup>3</sup> laid it down that " sailing without lights and in convoy and by an unusual route under naval orders did not constitute a warlike operation."<sup>4</sup> The cargo was cotton, and neither her port of departure nor her port of arrival was a " war base." (The *Coxwold* was carrying munitions from one war base to another.) A fourth extension was made in two later cases where a British merchant vessel was run into by a war vessel at night, both vessels sailing without lights. In *The Ardgantock*,<sup>5</sup> the *Tartar*, while on patrol and in the act of turning, ran into the *Ardgantock*. In *Richard de Larrinaga*,<sup>5</sup> *H.M.S. Devonshire* ran into the *Richard de Larrinaga* while the warship was proceeding to pick up a convoy. Both warships were held to be engaged in—and " moving in the course of "—a warlike operation of which the collisions were a consequence.<sup>6</sup>

The next step, said Lord Wright, was to treat a merchant vessel upon the same footing as a war vessel, *because of her cargo and " the character of the place of her departure or destination " ;* the fact that the peril was, " apart from the special character attributed to her, merely an ordinary marine casualty," was irrelevant<sup>6</sup> : " a big step which was taken once for all " in *The Geelong*.<sup>7</sup> Carrying cotton, she was run down and sunk in the Mediterranean by the *Bonvilston*, a British merchantman under requisition and carrying ambulances and government stores, and bound from Mudros to Alexandria, both war bases. Both ships were sailing at full speed and without lights and neither was negligent.

In *The Warilda*,<sup>8</sup> that requisitioned vessel, carrying wounded soldiers from France to Southampton, was damaged through her negligence in running into the *Petingaudet*. The damage was a consequence of the operation and was recoverable. *Negligence*

<sup>1</sup> [1942] A.C., at 708.

<sup>2</sup> *Ib.*, 708–712.

<sup>3</sup> *Per* Lord Wright [1942] A.C., at 709.

<sup>4</sup> [1942] A.C., at 709 ; author's italics.

<sup>5</sup> *Attorney-General v. Adelaide Steamship Co., Ltd.* [1923] A.C. 292, 298,

<sup>6</sup> [1921] 1 A.C. 99, by a majority.

<sup>7</sup> [1921] 2 A.C. 141.

<sup>8</sup> [1923] A.C. 191.

was immaterial. The warlike operation was the "dominant and effective cause." In the *Trevanion*,<sup>1</sup> a British merchant ship under requisition was run into by a navy mineplanter of the United States. Both vessels were negligent, but the loss was caused while the mineplanter was engaged on a warlike operation. The *Clan Matheson*,<sup>2</sup> which was not engaged on a warlike operation, was sunk by a vessel carrying war supplies and bound for a war base. The vessels were sailing in the same convoy from the United States to France. The collision, it was held, was solely due to the breakdown of the steering gear of the trading vessel and was not the consequence of a warlike operation.

Lord Wright concludes from these authorities :

"it is fallacious to require a connection between the casualty—stranding, collision, or the like—and the nature of the cargo being carried or the termini of the voyage. The nature of the cargo is, indeed, material at an earlier stage of the inquiry, the stage when what is being ascertained is whether there was a warlike operation. This, as the cases clearly show, does depend on the nature both of the cargo and the voyage. The theory as to liability which is developed in these authorities may seem arbitrary and artificial, but it is clear and consistent."<sup>3</sup>

Lord Wright finally addresses himself to the example put by MacKinnon, L.J. What if a tremendous wave carries away the bridge of a vessel engaged on a warlike operation ?<sup>4</sup> Some claims, Lord Wright answers, are clearly excluded from the war-risk provision : an accidental fire on board, or a leak due to inherent defects in the hull.<sup>5</sup> No one had suggested "so drastic a logic"<sup>6</sup> that where the vessel was engaged in a warlike operation every damage by peril of the sea was a consequence of warlike operations. The principle has been limited to *collision* or *cases resembling collision* (e.g., stranding) :—

"The basis of the decisions seems to be that the casualty can be traced to definite action on the part of those on board the warship or quasi-warship (if I may use the term) in directing the course of the vessel in order to carry out the warlike operation."<sup>4</sup>

(e) Lord Porter wisely observes that no form of words exists in which underwriters and insured can express precisely what they mean to include in war risks ; indeed, they do not know themselves. In eighty years they have found no better formula.<sup>6</sup>

In nine propositions,<sup>7</sup> Lord Porter summarises certain conclusions :—

<sup>1</sup> *Board of Trade v. Hain Steamship Co., Ltd.* [1929] A.C. 534.

<sup>2</sup> *Clan Line Steamers, Ltd. v. Board of Trade* [1929] A.C. 514.

<sup>3</sup> [1942] A.C., at 712.

<sup>4</sup> *Ib.*, 713.

<sup>5</sup> *Ib.*, 712.

<sup>6</sup> *Ib.*, 714.

<sup>7</sup> *Ib.*, 715, 716.

(i) The *proximate* cause alone is to be sought : *Ionides Case*.<sup>1</sup>

(ii) The proximate cause is the *dominant* cause, not necessarily the nearest in point of time : *Leyland Case*<sup>2</sup> ; *Samuel v. Dumas*.<sup>3</sup>

(iii) Sailing *without lights or in convoy, and zigzagging* on a voyage which is not a warlike operation, are not separately or in combination a warlike operation : *The Petersham*<sup>4</sup> ; *The Matiana*.<sup>4</sup>

(iv) The *dimming or extinguishing of a shore light* is a warlike operation, but if a ship in a mercantile operation goes ashore because she is out of her reckoning, she is not lost by warlike operation merely because, had the light been seen, she would have avoided the danger : *Ionides Case*.<sup>1</sup>

(v) "A ship carrying stores *from one war base to another* is engaged on a warlike operation : *The Geelong*."<sup>5</sup>

(vi) "A collision caused by a ship so engaged is caused by the warlike operation" : *The Ardgantock*<sup>6</sup> ; *The Richard de Larrinaga*.<sup>6</sup>

(vii) "A collision solely caused by a ship engaged on a mercantile adventure is not caused by a warlike operation even though that ship collides with or is struck by one engaged on a warlike operation" : *The Clan Matheson*.<sup>7</sup>

(viii) "If the collision be caused both by the ship so engaged and by one not so engaged so that both were effective causes of the disaster, the consequent loss is due to the warlike operation" : *Board of Trade v. Hain S.S. Co.*<sup>8</sup>

(ix) The collision, if due to the ship engaged in a warlike operation, does not cease to be so caused because the ship was negligent : *The Warilda*.<sup>9</sup>

"I should be prepared to hold," said Lord Porter, "that almost any casualty befalling a vessel as a result of her own action in proceeding on a voyage, in a case where proceeding on that voyage was a warlike operation, was caused by a warlike operation, and, like Lords Atkin and Finlay, I am unable to distinguish between damage to either or both vessels in a collision with the ship engaged on a commercial adventure due to the action of a ship engaged on a warlike operation and a stranding due to such action. I take the same view whether the misfortune was due to negligence or was accidental or inevitable . . ." <sup>10</sup>

A vessel, engaged on a warlike operation, however, if it suffers damage by "a definite external event, unexpected and unavoidable, in which the damaged vessel was not an active

<sup>1</sup> (1863), 14 C.B. (N.S.) 259.

<sup>2</sup> [1918] A.C. 350.

<sup>3</sup> [1924] A.C. 431.

<sup>4</sup> [1921] 1 A.C. 99.

<sup>5</sup> [1923] A.C. 191.

<sup>6</sup> [1921] 2 A.C. 141.

<sup>7</sup> [1929] A.C. 514.

<sup>8</sup> [1929] A.C. 534.

<sup>9</sup> [1923] A.C. 292.

<sup>10</sup> [1942] A.C., at 719.

participant but a quiescent sufferer"—e.g., if overwhelmed by the action of the sea alone—is probably to be regarded as suffering a loss due to perils of the sea and not as a consequence of warlike operations.<sup>1</sup>

## 2. *Requisitioned Ship on Way to Receive Orders*

Where a motor vessel carrying coal, while at anchor was struck and sunk by a steamship which, *under requisition*, was proceeding to Southampton for orders, *the uncommunicated intention of the Government being to use her for army transport*, the steamship at the time of collision was not engaged on a warlike operation: *The Brendonia*.<sup>2</sup>

"She was not carrying war personnel or war material," Viscount Caldecote, C.J., said. "She was not a combatant unit, nor was she performing any of the duties of a warship, such as patrol, or the search for enemy ships or aircraft. She was proceeding to Southampton as an ordinary merchant ship, except for the fact that she was steaming without lights."<sup>3</sup>

It was argued, on appeal, that whenever a ship, either a merchant ship or a warship, is setting out upon a defined duty, the warlike operation begins when she sets out. MacKinnon, L.J., rejected the argument as a "totally illegitimate extension" of the dicta concerning the preliminary passage of a *warship* to the scene of warlike operations. An "uncommunicated intention" by the Admiralty of using the *Brendonia* at a later stage on a warlike operation did not render her proceeding to anchorage "the carrying out of a warlike operation."<sup>4</sup>

## 3. *Ship Carrying Steel for Conversion into Shells*

Where a steamship carrying a general cargo was sunk by another, both vessels being equally to blame, and the second ship was carrying to commercial ports in France a cargo of steel rounds, shipped by the French Armament Mission, *intended to be converted into shells in France for the French army*, the cargo was not military equipment and the ship was not engaged on a warlike operation: *The Clan Stuart*.<sup>5</sup>

At the time of the collision in the English Channel, in March, 1940, the *Orlock Head* was in course of a voyage from Manchester and Liverpool to Rouen and Dunkirk. Armed with guns, she was carrying 1,519 tons of steel rounds and 168 tons of general merchandise to Rouen and Dunkirk which, on the evidence,

<sup>1</sup> [1942] A.C., at 719.

<sup>2</sup> *J. Wharton (Shipping), Ltd. v. Morileman and Another* [1941] 1 K.B. 340; affirmed [1941] 2 K.B. 283. See Lord Porter's comment, in *Larrinaga Steamship Co., Ltd. v. R.* (1945), 61 T.L.R. 242, 244, *infra*, 348.

<sup>3</sup> [1941] 1 K.B. 344.

<sup>4</sup> [1941] 2 K.B. 285.

<sup>5</sup> *Olan Line Steamers, Ltd. v. Liverpool and London War Risks Insurance Association, Ltd.* [1943] 1 K.B. 209, *per Atkinson, J.*

were being mainly used for commercial purposes and to a limited extent, for military purposes.

Atkinson, J., said that where a merchant ship is regarded as engaged in warlike operations, three features are present :—

- (i) The cargo is "military equipment or military stores."
- (ii) "Destined for a theatre of war; or, put otherwise, for a military force engaged in military operations."
- (iii) "It is on its way to a place where it will be available for that military force."<sup>1</sup>

Here, the cargo was not one of military equipment or stores; it was not destined for an army, nor was it being taken to an army. Between manufacture of armaments and the user of arms there is a "plain cleavage." "The carriage of raw material is part of the task of production. The service is rendered, not directly to the army, but to those responsible for production."<sup>2</sup>

"Carrying shells to troops engaged in combat," Atkinson, J., observed, "may well be regarded as a belligerent act, but can the taking of steel bars to a country be so regarded?"<sup>3</sup> After re-examining the authorities, Atkinson, J., ventured upon a definition of a warlike operation, as

"one which forms part of an actual or intended belligerent act or series of acts by combatant forces."<sup>4</sup>

The part may be performed *before* or *after* the act of belligerency, but there must be a "connection sufficiently close" between that operation and the belligerent act. A ship carrying equipment to a war base is engaged on a warlike operation. A ship carrying home equipment from a war base is similarly engaged. In the present case, the cargo was not yet "military equipment"; it was destined, not for a force in the field, but for a factory; it was not connected with any belligerent act.<sup>5</sup>

#### 4. Ship returning after Warlike Operation

Where a requisitioned ship, having carried munitions to a war base was, on her return, to be released from Government service, and, on discharge of the cargo, was ordered to leave the port by the sea transport officer, who refused a request that, owing to bad weather, the sailing should be deferred until the following morning, and where, in consequence of a storm, the ship stranded, the stranding was *not a consequence of the warlike operation which had come to an end*, but was due to a *peril of the sea*: *Larrinaga Steamship Co., Ltd. v. R.*<sup>6</sup>

In September, 1939, the owners of the *S.S. Ramon de Larrinaga* entered into a time charterparty with the Minister of War

<sup>1</sup> [1943] 1 K.B., at 212.

<sup>2</sup> *Ib.*, 213.

<sup>3</sup> *Ib.*, 214.

<sup>4</sup> *Ib.*, 221.

<sup>5</sup> *Ib.*, 222. An appeal was entered, but was later withdrawn.

<sup>6</sup> (1943), 1 All E.R. 450; [1944] 1 K.B. 124; (1945), 61 T.L.R. 241.

Transport. In October, 1939, while the owners were carrying out agreed services, she went aground near St. Nazaire. The owners filed a petition of right for their loss, viz.: £28,908 cost of repairs and £13,099 hire until the steamer was ready again for service. They had not effected any marine insurance policy, but preferred to be their own insurers. The charterers took war risks.

On 20th September, 1939, the vessel had sailed from Newport, Mon., with motor lorries for army transport. These she discharged at Nantes and then returned in ballast to Newport. On 5th October, she sailed with another cargo of army lorries for St. Nazaire, a war base, and by 13th October discharged her cargo. That evening the acting master, despite his protests owing to the bad weather, was ordered to leave in ballast, the berth being wanted for another ship, and to join a convoy for the Bristol Channel. On 7th October the owners had been informed by the Minister that after arrival at Newport the ship would be released from the charterparty. She left St. Nazaire in ballast, under a pilot, bound for Newport, and during a storm she went aground and was damaged.

Atkinson, J., held, and on this point the Court of Appeal and the House of Lords affirmed his judgment, that, the warlike operation completed, "the stranding on the homeward journey was not a consequence of it."<sup>1</sup>

Viscount Simon, L.C., said:—

"The fact that she was ordered by the sea transport officer to leave port sooner than her acting master thought wise cannot turn her disaster into the consequences of a warlike operation. The 'proximate' or 'determining' cause was a misfortune in navigation not attributable to any warlike operation at all."<sup>2</sup>

Thus, also, Lord Porter:—

"A voyage in ballast to a home port for the purpose of an off-survey is clearly not a warlike operation, and none the more so though the vessel engaged was performing a warlike operation on her voyage out . . . The *Ramon de Larrinaga* was travelling not for a warlike purpose but for a peaceful one; she had completed her war services and was sailing home to be released."<sup>3</sup>

An alternative claim was based upon cl. 9 of the charterparty, that the stranding was a consequence of the chief officer (during the master's illness) complying with an order of the charterers "as regards employment, agency or other arrangements." Atkinson, J., thought that the order to join the convoy was an order relating to "employment"; the charterers had agreed

<sup>1</sup> (1943), 1 All E.R. 453; 2 All E.R. 738, 739.

<sup>2</sup> (1945), 61 T.L.R. 242.

<sup>3</sup> *Id.*, at 244.



"to indemnify the owners from all consequences or liabilities that may arise from the master . . . complying with such orders." On appeal, MacKinnon, L.J., said that "employment," in cl. 9, referred, *not* to the employment of the *ship*, but to the employment of *stevedores, agents, or other persons*.<sup>1</sup>

The House of Lords held that "employment" did mean employment of the ship, but that the stranding of the vessel was not a consequence of the order to proceed to England: "It was only an incident which arose in the course of carrying the order out."<sup>2</sup>

"Employment," said Lord Wright, "means employment of the ship to carry out the purposes for which the charterers wish to use her."<sup>3</sup> The "sailing orders" merely dealt with "matters of navigation."

Lord Porter closely examined this aspect of the case: "An order that a ship shall sail at a particular time is not an order as to employment because its object is not to direct how the ship shall be employed but how she shall act in the course of that employment."<sup>4</sup> Moreover, the order to sail was

"not a charterer's but a naval order, none the less though the Crown is both charterer and the source from which naval authority is derived."<sup>5</sup>

#### 5. Frustration of Voyage, and Constructive Total Loss of Goods

Where a policy is free of any claim based upon loss of, or frustration of, the insured voyage or venture caused by arrests, restraints or detentions of kings, and, frustration of the voyage occurring, there is a *constructive total loss of the goods, the cargo-owners can recover for loss of the goods*, for such claim is based upon loss of goods, not upon the additional risk of loss of the adventure: *The Minden*; *The Wangoni*; *The Halle*.<sup>6</sup>

At the beginning of the war, German masters, carrying British goods to British or colonial ports, acting under orders of the German Government, at first put into neutral ports, then proceeded to make for Germany, and (when intercepted by British warships) scuttled their ships, or evaded the blockade and reached Germany. The voyage policies covered war and marine risks. The insured perils included enemies, restraint of princes and (by the incorporation of the Institute War Clauses) loss or damage caused by hostilities and warlike operations. The policies contained the "frustration clause":—

<sup>1</sup> [1944] 1 K.B., at 132.

<sup>2</sup> (1945), 61 T.L.R. 241, 242, per Viscount Simon, L.C.

<sup>3</sup> *Ib.*, at 243, for authorities.

<sup>4</sup> *Ib.*, at 244.

<sup>5</sup> *Ib.*, at 245.

<sup>6</sup> *Rickards v. Forestal Land, Timber and Railways Co., Ltd.*; *Robertson v. Middows, Ltd.*; *Kann v. W. W. Howard Brothers & Co., Ltd.* [1942] A.C. 50, affirming a decision of the Court of Appeal [1941] 1 K.B. 225, which had reversed a judgment of Hilbery, J.: (1940), 4 All E.R. 96. *McNair*, 253-255.

“ . . . warranted free of any claim based upon loss of, or frustration of, the insured voyage or venture caused by arrests restraints or detentions of kings princes peoples usurpers or persons attempting to usurp power.”

The issue in these three test cases selected by underwriters and cargo-owners was this: Were the British underwriters relieved by this clause from liability where a constructive total loss of the goods was established?

The facts were agreed<sup>1</sup>; no evidence was called; the court should have liberty to draw inferences of fact<sup>2</sup>; the underwriters agreed to pay the expenses of both sides.<sup>3</sup> Pleadings had been settled by opposing counsel in consultation.<sup>4</sup>

(i) *The Minden* was carrying wood extract from Buenos Aires for Hong Kong/Shanghai option (including transshipment at Durban). She sailed for Durban as her first port of call with the goods shipped under a bill of lading dated 16th August, 1939, and would normally have reached Durban about 15th September. Her course was due east, but on 24th August, she turned north and put in at Santos in Brazil, and on 25th August she arrived at Rio de Janeiro. Thence she sailed on 25th September, and on 29th September, in the presence of a British warship, was scuttled and lost off the Faroe Islands.<sup>5</sup> Hilbery, J., drew the inference that, should war break out, the master intended to stay there, or run the blockade for Germany, or, if he could not, scuttle the ship. He held that when the master sailed from Rio, there was a constructive total loss from restraint of princes.<sup>6</sup>

(ii) *The Wangoni* was carrying triplex boards from Bremen to Cape Town, shipped under a bill of lading, dated 12th August, and would normally have arrived about 12th September. Putting into Las Palmas on 29th August, on the same day the master sailed back for Vigo in Spain. There the ship arrived on 1st September, and stayed until 10th February, 1940. That day, putting to sea, she reached Hamburg on 10th March, 1940. Suggestions in the correspondence had been made in October, 1939, by brokers at Rotterdam, to deliver the goods at Vigo as a port of distress to the British owners on conditions, including payment of freight, surrender of the endorsed and receipted bills of lading, additional payment of 25 per cent. of the value of the goods for calling at a port of distress and an irrevocable bankers' guarantee for 100 per cent. of the value. The proposal was to be effective so far as discharge and delivery were

<sup>1</sup> Set out in (1940), 4 All E.R. 96, at 99, 114, 120, 121, respectively.

<sup>2</sup> *Ib.*, 100, 116, 117, 121, 122, respectively.

<sup>3</sup> *Per* Lord Porter [1942] A.C. 100, 101.

<sup>4</sup> *Per* Scott, L.J. [1941] 1 K.B. 225, 239.

<sup>5</sup> The facts are taken from the speech of Lord Porter [1942] A.C. 101-103.

<sup>6</sup> (1940), 4 All E.R. 96, 101.

possible. The underwriters' brokers replied: "act as if uninsured," and the proposal lapsed.<sup>1</sup> As soon as she sailed for Hamburg, the assured claimed for a total loss. After arrival, proposals for redelivery on terms were made through a Dutch house; a licence was granted to secure release through a neutral intermediary, but on 10th May the Germans invaded Holland.

(iii) *The Halle* was carrying jarrah boards from Bunbury in Australia to London, via the Cape. She sailed from Bunbury with the goods shipped under bills of lading dated 27th July, called at Durban on 16th August, and on 18th August rounded the Cape. She would normally have arrived in London about 16th September. On 6th September she took refuge at Bissao in Portuguese Guinea. It was not certain whether she was then acting under the orders of the German Government.<sup>2</sup> Thence she sailed on 13th October—Hilbery, J., inferred, for Germany; on 16th October, in the presence of a French warship, she was scuttled and lost.

After 3rd September, 1939, it was agreed that risk of capture existed when these ships were outside the territorial waters of a neutral State, and that there was an effective blockade of German ports by the British and French navies. The German Government had taken control of German-owned merchant shipping two weeks before war was declared, and had ordered their vessels to take refuge in neutral ports and, if possible, to return to Germany with their cargo, or, as a last resort, to scuttle their vessels.<sup>3</sup>

In *The Minden* and *The Halle* the assured claimed as for a total loss of the goods through the scuttling of the ships; alternatively, for a constructive total loss on the ground that the captains proceeded to neutral ports and thence towards Germany to hold the cargo for the German Government. In the *Wagoni*, the assured claimed as for a total loss of the goods, alternatively, for a constructive total loss, on the ground that the goods could only be obtained on payment to the shipowner's Dutch agents on conditions illegal to perform.<sup>3</sup>

The underwriters pleaded, *inter alia*, that the voyages were abandoned and the risks ended. Alternatively, they relied upon the frustration clause: the claims were based upon loss of an insured voyage. They counter-claimed declarations that they were entitled, by reason of deviation, to additional premiums. The assured, by their reply, asserted that the deviations were caused by circumstances beyond the control of the masters, or were reasonably necessary and were therefore excused. The underwriters agreed to waive absence of notice of abandonment,

<sup>1</sup> The correspondence is summarised (1940), 4 All E.R. 96, 114–116.

<sup>2</sup> *Ib.*, 121, 122.

<sup>3</sup> [1942] A.C. 57, in the statement of facts.

and each case was argued as if notice of abandonment had been properly given.<sup>1</sup>

(a) *Hilbery, J.*, held that when the ships left the neutral ports, there was a loss of the goods by restraint of princes, brought about by loss of, or frustration of, the insured voyage within the frustration clause. The policy was not in operation when the loss occurred; at the neutral port the insured voyage was abandoned, and a claim for constructive total loss did not lie. Loss of the goods arising out of the scuttling of the ships was a loss by warlike operation—which, however, did not occur while the policy was in operation.<sup>2</sup> “The policy being a marine insurance policy,” he said, “the subject-matter of the insurance is of the adventure of the goods on the voyage. The goods are not insured apart from the voyage. It is the voyaging with the goods or the goods upon the voyage which is the subject-matter of the contract.”<sup>3</sup>

(b) This decision was reversed by the *Court of Appeal*, who held that the frustration clause did not bar claims for the loss of the goods, but applied to claims which could *only* be based on loss of the voyage.<sup>4</sup>

When the ships left the neutral ports, the German Government converted the goods to its own use, said Scott, L.J.; there was a constructive total loss of the goods, provided that the loss was proximately caused by a peril within the policy.<sup>5</sup> Loss of the voyage could not exclude recovery for the loss of the goods<sup>6</sup>; *only where no claim can be made except for loss of the adventure* does the frustration clause apply.<sup>6</sup> MacKinnon, L.J., observed that the frustration clause was “designed to counteract” the effect of *Sanday's Case*,<sup>7</sup> where the insured goods were in the possession of the assured, who were entitled to recover for a constructive total loss because the insured voyage had been ended by an insured peril. “Free of any claim based upon loss of the insured voyage” means “free of any claim which is in fact based, and can only be based, upon loss of the insured voyage.” It does not mean “free of any claim which on the facts might be based on loss of the insured voyage”<sup>8</sup>:

“The subject-matter of the contract is, of course, the goods, and they are insured against loss or damage by insured perils. But even if the goods are not so lost or damaged, there is an *additional* insurance against the loss of this voyage.”

The House of Lords affirmed this decision.<sup>9</sup>

<sup>1</sup> [1942] A.C., at 58.

<sup>2</sup> *Ib.*, 59.

<sup>3</sup> (1940) 4 All E.R. 96, 103.

<sup>4</sup> [1941] 1 K.B. 225.

<sup>5</sup> *Ib.*, 241.

<sup>6</sup> *Ib.*, 242.

<sup>7</sup> [1916] 1 A.C. 650, *supra*, 324.

<sup>8</sup> [1941] 1 K.B. 249.

<sup>9</sup> [1942] A.C. 50.

(c) *Viscount Simon, L.C.*, declared that two questions arose. *First*, did the loss occur when the cargo-owners were still covered by the policies? *Secondly*, were the underwriters relieved from liability by the frustration clause?<sup>1</sup> Upon the first question, a constructive total loss occurred while the goods were still covered. When the German captain held the goods "as the subject and servant of that [*sc.* the German] government instead of holding them as the bailee of the assured," that was a *restraint of princes or peoples*.<sup>2</sup> Notice of abandonment would be excused under Marine Insurance Act, 1906, s. 62 (3) and (7). Upon the second question: "when goods are insured under a voyage policy, the subject-matter of the contract is, of course, the goods engaged in the adventure. Loss of or damage to the goods on the voyage gives rise to a valid claim."<sup>2</sup> The frustration clause means "free of any claim which is in fact based, because it can only be based, upon loss of the insured voyage."<sup>3</sup>

(d) *Viscount Maugham* observed that the masters ceased to hold the goods as bailees of the assured—in the case of the *Minden* at Rio, in the case of the *Wangoni* at Vigo, and in the case of the *Halle* at Bissao.<sup>4</sup> The contract of marine insurance—from the first, a contract of indemnity—was generally for a voyage by a prescribed route.<sup>5</sup> Often it was necessary to tranship the goods to another vessel, e.g., at Cadiz or Lisbon. Since the name of the second ship could not be known, the risk continued until the goods were unloaded at the port of destination. If the goods were unloaded elsewhere, from a very early date this justified a claim for "loss of adventure."<sup>6</sup> A marine policy on goods

"in its essence is a contract by the underwriters to indemnify the assured either for losses (total or partial) of the goods themselves or for losses he may sustain by reason of the goods not arriving in safety at their destination though the goods themselves are in safety and uninjured, and in either case as a direct consequence of one of the perils insured against."<sup>7</sup>

*Viscount Maugham* continued:—

"The contract is an insurance against losses of two different kinds in relation to the goods. The first involves loss or damage to the goods themselves; the second involves merely

<sup>1</sup> [1942] A.C., at 63.

<sup>2</sup> *Ib.*, 64.

<sup>3</sup> *Ib.*, 65.

<sup>4</sup> *Ib.*, 67.

<sup>5</sup> *Ib.*, 69. *Viscount Maugham* refers, upon the origin of the contract, to *Holdsorth, History of English Law*, 2nd ed., viii, 274 *et seq.*

<sup>6</sup> *Ib.*, 70, quoting from *Le Guidon de la Mer* (1600), chap. 7, upon total loss justifying abandonment: "If the damage exceeds half the value of the thing, or if the voyage be lost [*my italics*]; or so disturbed that the pursuit of it is not worth the freight." Cited, also, by Lord Mansfield, in *Hamilton v. Menden* (1761), 2 Burr. 1198, 1210. *Viscount Maugham* refers to Lord Mansfield's explanation in *Goss v. Withers* (1758), 2 Burr. 683, of the basis of constructive total loss.

<sup>7</sup> *Ib.* 71., Referring to *Sanday's Case* [1915] 2 K.B. 781, 811.

that they have not reached their destination though they may be perfectly safe."<sup>1</sup>

The "frustration clause" relieves the underwriters from liability under the second head, but not from liability under the first head (if the risk has not come to an end).

The "main and primary subject" of an insurance on goods is the goods—"as tangible chattels."<sup>1</sup> The liability for loss of adventure—added to the indemnity—"is of a somewhat artificial character."<sup>1</sup> A claim for loss of goods has never been regarded as "a special kind of claim for loss of adventure."<sup>2</sup>

"Historically it is reasonably clear that the goods were first the subject-matter of the insurance and that then the loss of the voyage came to be regarded as involving a (constructive) total loss of the goods, provided there was an abandonment in due time."<sup>3</sup>

(e) *Lord Wright*, stating the facts with particularity, said that the act of the master in sailing from Rio was a *restraint of princes*. He pointed out that diversity of expression upon the same matter is common in a marine insurance policy which, in many ways is "obscure, loosely drawn and inaccurate."

"A contract embracing so many interests and parties and liable to be affected by so many events, cannot but be subject to some difficulties of construction, however carefully it may be drawn."<sup>4</sup>

The master's act was "an executive act of the German Government."<sup>5</sup> In possession of the goods as carrier, he ceased to hold them as carrier, but, on express orders, took control of them as agent for the German Government, and thus deprived the owners of them. "The overt act of hostile seizure" was when he sailed from Rio. "A restraint may operate without any display of force . . . The restraint . . . was the compelling force of the German State, to which he was subject. In one sense it was a moral compulsion, but in another sense it was more, because it may be assumed that he was aware that if he had disobeyed the order, his government had means of vindicating its authority, if not at the moment, at least subsequently."<sup>6</sup> A "close analogy" could be found in *Sanday's*

<sup>1</sup> [1942] A.C., at 71.

<sup>2</sup> *Ib.*, 72.

<sup>3</sup> *Ib.*, referring on "loss of voyage" to *Barker v. Blakes* (1808), 9 East 283, 294.

<sup>4</sup> Cited *ib.*, 79, from Phillips, *Insurance*, Boston (1867), I, 5.

<sup>5</sup> *Ib.*, 79.

<sup>6</sup> *Ib.*, 80. Lord Wright refers to *Miller v. Law Accident Insurance Company* [1903] 1 K.B. 712, where the master, in obedience to an order of the Argentine Government, after arrival at Buenos Aires, transferred the cattle suffering from a contagious disease from the ship to another ship and abandoned the adventure. Mathew, L.J., said (at 721, 722): "If actual force was not used it was because there was no opposition. The master submitted to the orders of the administration. The result to the assured was the same as if force had been used . . ."

In *Becker, Gray & Co. v. London Assurance Corporation* [1918] A.C. 101, 115,

*Case.*<sup>1</sup> Masters of British vessels carrying British cargo to Hamburg early in August, 1914, being informed of the outbreak of war, abandoned the voyage to Germany and proceeded to British ports. There was a loss of goods by *restraint of princes*. The *restraint* was of English law, operating on British subjects, and making the adventure illegal :

"There may be a restraint, though the physical force of the State concerned is not immediately present. It is enough, I think, that there is an order of the State, addressed to a subject of that State, acting with compelling force upon him, decisively exacting his obedience and requiring him to do the act which effectively restrains the goods. Thus the seizure or restraint effected in obedience to that order becomes, in a case like the present, the belligerent act of the German Government, though it is committed by the master of a German merchantman on the high seas or in neutral territory."<sup>2</sup>

The *deviation* to Santos and then to Rio was "clearly in furtherance of German war policy and under German Government control. Thus, it was not the voluntary act of the master . . . It was the direct effect of the restraint."<sup>3</sup> Deviation is *excused*, under s. 49 (1) (b), where caused by circumstances beyond the control of the master and his employer. The master and his employer were bound to obey the orders of their government.<sup>4</sup> Nor was the *change of voyage* voluntary within s. 45 (1): it was "act and part of the hostile seizure."<sup>5</sup>

Lord Wright proceeds to analyse the doctrine of "*constructive total loss*"—a concept "peculiar" to marine insurance.<sup>6</sup> Subject to the provisions of the policy, a constructive total loss occurs where the *subject-matter* is "reasonably abandoned" because its actual total loss appears unavoidable, or because the expense of preserving it from actual total loss would exceed its value when the expense had been incurred.<sup>6</sup> *In particular*, a

Lord Sumner said of that case: "The frustration of the adventure was caused by the direct operation of an order which was an act of State and was backed by the existence of available force, though its employment proved to be unnecessary."

<sup>1</sup> [1916] 1 A.C. 650; *supra*, 324-326.

"I am not pressed by the circumstances that force was neither exerted nor present, for force is in reserve behind every State command. And it would be a strange law which deprived the assured, if otherwise entitled to his indemnity, upon the ground that he had not resisted, till the hand of power was laid upon him, an order which it was his duty to obey": *per* Earl Loreburn (at 659).

<sup>2</sup> [1942] A.C. 81, 82.

<sup>3</sup> *Ib.*, 82.

<sup>4</sup> See *Phelps v. Auldjo* (1809), 2 Campb. 350, 351, *per* Lord Ellenborough, C.J.: "If a degree of force was exercised towards him which, either physically he could not resist, or morally as a good subject he ought not to have resisted, the deviation is justified."

<sup>5</sup> [1942] A.C. 88.

<sup>6</sup> Section 60 (1). Lord Wright (*ib.*, 83) cites from Phillips, *Insurance*, vol. 2, 319, that upon seizure or capture of the goods, there arises "... the right of abandoning immediately; and this right subsists so long as the property is detained by the captors or by their government, whether in port or at sea."

constructive total loss occurs where the assured is *deprived of possession* of his ship or goods by an insured peril and (a) it is *unlikely* that he can recover ship or goods, or (b) the cost of recovery would exceed the value when recovered.<sup>1</sup>

In *Robertson v. Petros M. Nomikos, Ltd.*,<sup>2</sup> the House thought that in these two subsections are contained two separate definitions applicable to different conditions of fact. Subsection (2) is *additional* and gives an *objective criterion*.

What, in the first place, is the decisive date?

"A constructive total loss is a device intended to subserve the purpose of indemnity by enabling the assured, when, by insured perils, the postulated danger of loss or deprivation is caused, to disentangle himself, subject to definite limits and conditions, from the danger and throw the burden on the underwriters. If the assured elects to avail himself of this option, he must do so by giving notice of abandonment within a reasonable time after the receipt of sufficient information. He is not allowed to await events to see how things turn out, or to decide what may best suit his interests. If he duly elects to abandon on good grounds, the risk is ended, because the assured can recover as for a total loss, and the salvage vests in the underwriter."<sup>3</sup>

At common law, the date of the issue of the writ was the decisive date, not the date of giving notice of abandonment.<sup>4</sup> In Lord Wright's opinion, the Act has not changed the rule,<sup>5</sup>

<sup>1</sup> Section 60 (2) (i) (a), (b).

<sup>2</sup> [1939] A.C. 371, 383, *per* Lord Wright, and at 392, *per* Lord Porter.

<sup>3</sup> [1942] A.C. 83, 84.

<sup>4</sup> *Ib.*, 84. See *Ruys v. Royal Exchange Assurance Corporation* [1897] 2 Q.B. 135, 137-142. Collins, J., cited from the judgment of Lord Mansfield, in *Hamilton v. Mendes*, 2 Burr. 1198, 1210: "The plaintiff's demand is for an indemnity. His action then must be founded upon the nature of his damnification as it really is at the time the action is brought. It is repugnant, upon a contract of indemnity, to recover as for a total loss, when the final event has decided that the damnification in truth is an average, or perhaps no loss at all." After surveying the authorities, Collins, J., concludes [1897] 2 Q.B. 142: "The text-writers . . . treat it as settled law that the rights of the parties must be ascertained as at the date of the action brought . . . the line of the writ may be regarded as a line of convenience which has been settled by uniform practice for at least seventy years."

See Chalmers, *Marine Insurance Act*, 1906 (1932), 4th ed., 89, 90.

See also Arnould, s. 1096: ". . . the right of the assured, after having given such notice, to recover as for a total loss, depends entirely on the state of things as it exists at the time of action brought." The law of the United States differs on this point: an abandonment, once rightfully made, is binding (s. 1097). There is no statement in the Act that the right to claim for a total loss is liable to be defeated by subsequent change of circumstances. The editors of Arnould, 12th ed. (1937), regarded the matter as open and reasonably arguable either way (s. 1097 a).

In *Roura & Forgas v. Townend* [1919] 1 K.B. 189, 196, however, Roche, J., thought that "restoration precludes recovery."

<sup>5</sup> *Ib.*, 85, citing *Polaris Steamship Co., Ltd. v. Young* [1915] 1 K.B. 922.



Since, in the present cases, notice of abandonment was waived, the assured could fix the date at any time that suited them.

What, *secondly*, is meant by the "subject-matter insured" or "goods"—as used in s. 60? "The words of this policy," said Earl Loreburn in *Sanday's Case*,<sup>1</sup> "have for generations been understood and held by judges to designate, not merely the goods, but also the adventure."

*Thirdly*, the meaning of the term "unlikely" was decided in *Polurrian Steamship Co., Ltd. v. Young*.<sup>2</sup> A neutral steamer, while carrying contraband, had been captured by the Greek Government during the Greco-Turkish War of 1912. The master denied that, when he was carrying the goods, he knew that war existed, but at the date of the writ the captors contested his innocence. At the date of the writ, it was "uncertain" whether the vessel which had been put into the Prize Court (the contraband taken out) would be released; at the trial she had been released after six weeks' detention. The Court of Appeal held that although it was *uncertain*, it was not "unlikely." The Act had modified the law, said Kennedy, L.J., to the disadvantage of the assured: "unlikelyhood" had been substituted for "uncertainty."<sup>3</sup>

That the goods would be recovered from the *Minden* was "unlikely." It was "unlikely" that she would evade the blockade. If she were captured, the assured would have required his goods, but to prevent that contingency the master was required by his government to scuttle. If she ran the blockade and reached Germany, the goods would be irretrievably lost. "A failure to establish a constructive total loss does not in general prevent a later claim for an absolute total loss if changed circumstances justify it."<sup>4</sup> Notice of abandonment was waived, and in any event the vessel was finally lost before the assured knew: under s. 62 (7) notice of abandonment was unnecessary.

"The primary subject of the insurance is the goods as physical things, but there is superimposed an interest in the safe arrival of the goods. This is very old law."<sup>5</sup>

<sup>1</sup> [1916] 1 A.C. 650, 675; *supra*, 324–326.

<sup>2</sup> [1915] 1 K.B. 922. See also *The Lavington Court* (1944), 2 All E.R. 249, 253, where recovery of the torpedoed ship was "uncertain," but not "unlikely."

<sup>3</sup> *Ib.*, 937. See Chalmers, *op. cit.*, 80.

<sup>4</sup> *Ib.*, 88. Lord Wright cites *Stringer v. English & Scottish Marine Insurance Co.* (1869), L.R. 4 Q.B., *per* Blackburn, J., 676, 690, affirmed: (1870), L.R. 5 Q.B. 599, 606, *per* Martin, B., and *Woodside v. Globe Marine Insurance Co.* [1896] 1 Q.B. 105.

<sup>5</sup> *Ib.*, 90. Lord Wright, referring to Arnould, s. 343 ("valuation of goods may exceed expected profits"), and *Forbes v. Aspinall* (1811), 13 East 323, 325, *per* Lord Ellenborough, C.J.: "its sole object [*sc.* insurance upon freight] is to protect the assured from being deprived, by any of the perils insured against, of the profit

In a valued policy on goods, the goods are usually valued in excess of their value on shipment, in order to cover loss of market or other advantage, e.g., use as raw material or machinery for the assured's factory.

" . . . A policy on goods is in truth one covering a composite interest, the physical things or chattels, and also the expected benefit from their arrival. The subject-matter may be described as chattels-cum-adventure. It seems to follow inevitably that, if the goods are lost, the adventure is lost also. If they are damaged and suffer a partial loss, the adventure may or may not be lost. But the adventure may be lost even though the goods are neither damaged nor lost nor taken from the assured's possession or control."<sup>1</sup>

The frustration clause does not, however, apply where the assured claims for "loss of, or damage to, the actual physical things, or chattels."

" . . . The primary subject-matter is the goods, . . . the adventure is merely ancillary or accessory. A claim in respect of the loss of the adventure is an added benefit granted to the assured over and above his interest in the goods themselves. The expression by its language is expressly limited to the loss of, or frustration of, the insured voyage or adventure. Its language cannot, in my opinion, be twisted to make it exclude a claim for actual loss of or damage to the goods themselves."<sup>2</sup>

When the *Wangoni* sailed from Vigo the position was substantially the same as when the *Minden* sailed from Rio: there was a constructive total loss and the subsequent correspondence did not render it less "unlikely" that the goods would be recovered. Transhipment into another vessel for Capetown was not "reasonably practicable." Even if delivery were obtainable at Vigo on "the onerous terms of the contingent proposal," it would be necessary to obtain space on a vessel for Capetown, or for England with "a further transhipment" to Capetown; "the proposition was uncertain and hypothetical, as well as exorbitant."<sup>3</sup> A goods owner must act *reasonably*,

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he would otherwise earn by the carriage of goods": *Usher v. Noble* (1810), 12 East 639, 646-648, per Lord Ellenborough, C.J.

Compare *Sanday's Case* [1916] 1 A.C. 650; the cargoes were safe, but upon the voyage becoming unlawful, the adventure was frustrated.

Compare also *Rodoconachi v. Elliott* (1874), L.R. 9 C.P. 518; cargoes from Japan to London were detained in France during the investment of Paris in 1870. The goods were safe but the war prevented the owners from dealing with them: a constructive total loss by restraint of princes.

<sup>1</sup> [1942] A.C., at 90, 91.

<sup>2</sup> *Ib.*, 91.

<sup>3</sup> *Ib.*, 96. Lord Wright refers to *Lozano v. Janon* (1859), 2 E. & E. 160, 177, per Lord Campbell, C.J., and *Stringer's Case* (1869), L.R. 4 Q.B. 676, 691, per Blackburn, J. In the former case, goods had been captured and condemned at St. Helena. A perishable part of the cargo was sold. The remainder was released after two years. The assured, having given notice of abandonment, claimed for a

but no more, to avert or minimise a loss. He acted reasonably here. At least when the ship left Vigo, there was a constructive total loss, not adeemed by her later arrival at Hamburg, where there was an actual total loss of the goods.<sup>1</sup>

Of the *Halle*, Lord Wright was ready to infer—"having regard to modern facilities for wireless communications"<sup>2</sup>—that the master put into Bissao because he heard that war had broken out and felt it was unsafe to proceed: s. 49 (1) (d) applied.<sup>3</sup> At the date of the writ—if there was not a constructive total loss—there was an actual loss by scuttling.<sup>4</sup>

(f) *Lord Porter*, summarising succinctly the facts, the essential features and the issues, observed:—

"The goods are lost, and it is unnecessary for the assured to rely on the loss of the adventure. Underwriters do not succeed in proving a loss within the exception merely by showing that the adventure has been lost. A total loss of goods must always have that result. They must go further and show that the claim of the assured follows, and is based on, the loss of the adventure, not merely that the loss of the adventure is a consequence of the loss of the goods, even though that loss be due to combatant seizure."<sup>5</sup>

In deciding whether there was a constructive total loss, one must judge, "not by the result, but from the probabilities as they would have appeared to a reasonable assured at the moment when he knew of his loss and could have given notice of abandonment, had notice been required."<sup>6</sup>

#### 6. *Perishable Cargo not Transhipped or Released*

Where a German ship, carrying British cargo of *perishable goods*, sheltered at the beginning of the war in an Italian port when Italy, nominally neutral, was helping Germany—*German shipping since 25th August, 1939, being under the control of the German Government—and no transhipment or release could be arranged*, the owners, when the cargo had deteriorated in October, 1939, were entitled to give notice of abandonment and to claim for a constructive total loss: *The Czarnikow Case*.<sup>7</sup>

total loss: a prudent man could not be expected to take possession of the unsold goods at St. Helena. In the latter case, a sale might have been prevented, but only on terms that a prudent uninsured owner would not have adopted.

<sup>1</sup> [1942] A.C. 98. On "ademption of loss," see Chalmers, *op. cit.*, 89, 90.

<sup>2</sup> *Ib.*, 99.

<sup>3</sup> Deviation or delay is excused "where reasonably necessary for the safety of the ship or subject-matter insured." See Arnould, s. 432.

<sup>4</sup> [1942] A.C. 99.

<sup>5</sup> *Ib.*, 107, 108.

<sup>6</sup> *Ib.*, 110, 111.

<sup>7</sup> *Czarnikow, Ltd. v. Java Sea & Fire Insurance Co., Ltd.; Leslie & Anderson Ltd. v. Java Sea & Fire Insurance Co., Ltd.* (1941), 3 All E.R. 256. Viscount Caldecote, L.C.J., delivered judgment on the day when the House of Lords gave judgment in the *Minden Case*.

Czarnikow, Ltd., were interested as buyers under c.i.f. contracts, in policies of marine insurance subscribed by the Java Company, dated 8th August, 1939, upon 500 tons of copra loaded in the German ship *Oder* for a voyage from Singapore to Hamburg and Rotterdam. The copra was shipped on 8th August. On 20th August the master put into Massawa—nominally neutral, Italy being “non-belligerent”—and the *Oder* and her cargo were there when the writ was issued. On 6th September the master made a declaration reserving all his rights for the fact that the steamer, by order of the German Government, had entered Massawa to save the ship, cargo and crew from confiscation. Early in October unsuccessful attempts were made to obtain release and transhipment of the cargo. On 16th October the plaintiffs gave notice of abandonment, which the company refused to accept. On 30th October the plaintiffs issued a writ claiming for a total loss.

In November fresh proposals for release were made—unsuccessfully. The copra, in a very hot climate for two months, had become almost useless. The London Chamber of Commerce were authorised to pay freight and necessary charges to obtain possession of such cargo in neutral ports, but the Board of Trade refused permission to pay an extra 20 per cent.

The court held that in putting into Massawa the captain was obeying the orders of the German Government. This constituted a *restraint of princes and peoples*.<sup>1</sup> He was bound to stay there, to await whatever fresh directions might reach him. The plaintiffs were deprived of possession of their goods under s. 60 (2) (i) by an insured peril. On 30th October it was “*unlikely*” that the cargo owners would recover their goods; there was a constructive total loss proximately caused by an insured peril.

## VII. INSURANCE, AND TREATY OF VERSAILLES

The Treaty of Versailles made specific provision for contracts of insurance to which one of the parties became an alien enemy.

### 1. *Contracts of Fire Insurance Suspended*

Contracts of *fire insurance* made by a person interested in the property with a person who became an enemy *were not deemed to have been dissolved* by the outbreak of war, or by the fact that one party became an enemy, or because of his failure during the war and for three months thereafter to perform his contractual obligations. They should be dissolved, however, when the annual premium first became payable after three months from the coming into force of the Treaty.

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<sup>1</sup> (1941), 3 All E.R., at 261.

A settlement would be effected of unpaid premiums which became due during the war, or of claims for losses occurring during the war.<sup>1</sup>

## 2. *Contracts of Marine Insurance*

(a) Contracts of *marine insurance* (including time policies and voyage policies) made between an insurer and a person who became an enemy, *would be deemed to have been dissolved* on his becoming an enemy, except where the risk attached before he became an enemy.

(b) Where the *risk had not attached*, any premium or other money paid was recoverable from the insurer.

Where the *risk had attached*, effect should be given to the contract, and sums due as premiums or in respect of losses would be recoverable after the coming into force of the Treaty.

(c) In the event of agreement for the payment of *interest* on sums due before the war to or by the nationals of States which had been at war, and recovered after the war, interest on losses recoverable under contracts of marine insurance would run from the end of one year after the loss.

(d) Where the *assured* became an enemy, losses due to *belligerent action* by the power of which the insurer was a national, or by its allies or associates, were not recoverable.

(e) Where the assured, before the war, made a contract with an *insurer* who became an enemy, and after the outbreak of war made a *new contract* covering the same risk with an insurer who was not an enemy, the new contract was deemed to be *substituted* for the original contract from the date when it was made. The original insurer remained liable until the date of the new contract only; the premiums payable would be adjusted accordingly.<sup>2</sup>

## 3. *Reinsurance*

(a) Treaties of *reinsurance* with a person who became an enemy were deemed to have been *abrogated*.

(b) In the case of *life or marine risks*, however, which had attached *before the war*, the right to recover after the war sums due on those risks, was preserved.

(c) Where a reinsurance treaty thus became void, there would be an *adjustment of accounts* in respect of pre-war premiums and liabilities, to be met as at the date of the parties becoming enemies, without regard to subsequent losses (except in case of life and marine risks).

(d) *Reinsurance of life risks* effected by *particular contracts* and not under general treaty, remained *in force*.

<sup>1</sup> Section V, Annex III, para. 9; Picciotto & Wort, 48-50. By para. 19, other insurances (apart from life and marine insurances) were similarly treated.

<sup>2</sup> Section V, Annex III, paras. 16-18; Picciotto & Wort, 53-55.

(e) In the case of a *pre-war reinsurance* of a contract of *marine insurance*, the cession of a risk ceded to the reinsurer, which attached before the outbreak of war, should remain *valid* and effect should be given to the contract. Sums due for premiums or in respect of losses should be recoverable after the war.<sup>1</sup>

<sup>1</sup> Section V, Annex III, paras. 20-23; Picciotto & Wort, 55-57.

## CHAPTER XIV

### CONTRACT OF SERVICE

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## A. UNDER DEFENCE (GENERAL) REGULATIONS

### I. DEFENCE (GENERAL) REGULATION 58A

THE Emergency Powers (Defence) Act, 1940, provided that Defence (General) Regulations might be made—

“making provision for requiring persons to place themselves, their services, and their property at the disposal of His Majesty, as appear to him to be necessary or expedient for securing the public safety, the defence of the Realm, the maintenance of public order, or the efficient prosecution of any war in which His Majesty may be engaged, or for maintaining supplies or services essential to the life of the community.”<sup>1</sup>

By reg. 58A, the Minister of Labour and National Service is entitled *by directions* to control the employment of “any person in the United Kingdom.”<sup>2</sup>

<sup>1</sup> Section 1 (1). These purposes are not “mutually exclusive:” *per* Lord Greene, M.R., in *The Carltona Case* (1943), 2 All E.R. 560, 563, *supra*, 68–70.

See Hoague, Brown & Marcus, *Wartime Conscription and Control of Labor* (1940), 54 Harv. L. Rev. 50–104. See also *Mobilization for Defense* (1940), 54 Harv. L. Rev. 278–310.

<sup>2</sup> S.R. & O., 1940, No. 781, amended by S.R. & O., 1941, Nos. 257, 2052.

For orders made under reg. 58A, see Krusin & Rogers, V, 285–295.

1. By *The Control of Employment (Directed Persons) Order*, 1943 (S.R. & O., 1943, No. 651), the employer of a directed person must keep him in employment for the period specified in the direction, unless the directed person is discharged for serious misconduct or the directions are withdrawn (para. 2 (1)). A directed person or his employer may apply in writing to a national service officer for the withdrawal of directions (para. 3 (1)). Dismissal for serious misconduct, in the first instance, is provisional. If, within the prescribed period, the directed person requires a national service officer to submit the matter to a local appeal board and reinstatement is directed, dismissal will be treated as having been ineffective. If the directed person fails to require the matter to be submitted within the prescribed

### 1. Power to direct Persons to perform Services

The Minister, or any national service officer, may direct any person in the United Kingdom to perform specified services or services described in the direction, in Great Britain or in a British ship (which is not a Dominion ship). The services must be those which that person is, "in the opinion of the Minister or officer, capable of performing."<sup>1</sup>

A direction (unless a contrary intention appears) continues in force until varied by a later direction, or withdrawn by the Minister or a national service officer.<sup>2</sup>

Where a direction has been given and the capability of the workman to perform the work is admitted and there has been a failure to comply, the justices are not entitled to inquire whether the direction was reasonable: that is solely for the Minister: *Horton v. Owen*.<sup>3</sup>

The court followed *Minister of Agriculture and Fisheries v. Price*,<sup>4</sup> where a County War Agricultural Executive Committee had given, under reg. 62, a direction to cultivate and there was a failure to comply: the justices were not entitled to inquire into the reasonableness of the direction.

Tucker, J., did not think that the term "capable" was confined to "physical capability":

time or the national service officer notifies him and his employer that he does not intend to direct reinstatement, the dismissal will be treated as having been always operative and the directions will be treated as having been withdrawn (para. 3 (4)). The order does not apply to directed persons employed under the Essential Work (General Provisions) (No. 2) Order, 1942, and other specified Essential Work Orders.

2. By *The Control of Employment (Notice of Termination of Employment) Order*, 1943 (S.R. & O., 1943, No. 1173), where notice of termination of employment of any worker to whom the order applies is given or received, or where any such employment is terminated without notice, the employer must give to an employment exchange notice in writing of termination, containing specified particulars (para. 2 (1) (2)). The workers to whom the order applies are all persons who on or immediately before the day on which their employment terminated or was due to terminate were employed by an employer (with or without remuneration), except persons specified in the schedule (para. 3).

3. By *The Employment of Women (Control of Engagement) Order*, 1943 (S.R. & O., 1943, No. 142), no person must seek to engage or engage any female person for employment otherwise than by notifying to a local office or approved employment agency (i.e., one carried on in accordance with arrangements approved by the Minister and under directions by the Minister), particulars of the vacancy and by engaging a female person submitted by the local office or such agency unless she is under eighteen or over forty-one. A female person must obtain her employment by applying to a local office or such agency or by submission to an employer by the local office or such agency and not otherwise, unless she is under eighteen or over forty-one (para. 2). Certain employments are excepted (para. 3).

<sup>1</sup> Regulation 58A, para. (1).

<sup>2</sup> Paragraph (1A).

<sup>3</sup> [1943] 1 K.B. 111. A fitter, suffering from asthma and bronchitis, refused to comply with a direction, on the grounds of health and lack of travelling facilities to enable him to go back home every day. The Minister is the sole judge of a person's capability.

<sup>4</sup> [1941] 2 K.B. 116.



" it must involve the consideration of the locality of the work where the person is required to perform the services, coupled with a consideration of the person's physical, or, perhaps, mental, capacity to perform that work in that particular place."<sup>1</sup>

## 2. Power to determine Conditions

The Minister, or a national service officer, may direct *the terms* of such employment, including *remuneration and conditions of service*.<sup>2</sup>

(a) In determining the terms, regard will be had to *rates of salary, fees or wages* which appear to be *usual*.

(b) In the case of services *usually rendered under a contract of service*, regard will be had to *determinations* dealing with *remuneration and conditions*, of persons employed in the district, the capacity and the trade which apply in the particular case. These are determinations contained *either*—

(i) in an *agreement* between organisations representative of employers and workers; *or*

(ii) in a *decision* of a joint industrial council, conciliation board, arbitration tribunal, or other similar body.

(c) If no such industrial agreement or decision applicable to the particular case exists, regard will be had to—

" the remuneration and conditions of service in practice *prevailing among good employers in that trade in the district*."<sup>3</sup>

Such directions may be given by persons duly authorised in writing by the Minister, called " National Service Officers."<sup>4</sup>

## 3. Regulation of Engagement

The Minister may, *by order*, make provisions for *regulating the engagement of workers by employers*, and for *regulating the duration of employment*.<sup>5</sup>

The Minister has *power to implement by order* the previous provisions of this regulation.

Any such order may, in particular, provide—

(a) for requiring persons to *register prescribed particulars* about themselves or persons employed by them<sup>6</sup>;

(b) for requiring persons carrying on any undertaking to *keep prescribed books, accounts and records*;

(c) for requiring persons carrying on, or employed in, undertakings to *produce to a person designated by the Minister*

<sup>1</sup> [1943] 1 K.B. 114.

<sup>2</sup> Regulation 58A, para. (2).

<sup>3</sup> Proviso to para. (2); author's italics.

<sup>4</sup> Paragraph (3).

<sup>5</sup> Paragraph (4).

<sup>6</sup> See The Registration for Employment Order, 1941, S.R. & O., 1941, No. 368. For Registration Orders, generally, see Slack, *Liability for National Service*, 222-239. By (Amendment) Order, 1944 (S.R. & O., 1944, No. 80), certain classes of persons become liable to register as soon as they have been in Great Britain for three months.

*or by a person specified in the order, books, accounts or documents, and to furnish prescribed estimates, returns or information ;*

*(d) for incidental and supplementary matters, including the entry and inspection of premises.*

Such provisions may relate either to persons or undertakings generally, or to any particular person or undertaking, or class or description of persons or undertakings.<sup>1</sup>

#### 4. *Securing Workers in Essential Work*

The Minister may, by order, provide for securing that *enough workers* are available in "*undertakings engaged in essential work.*"<sup>2</sup> "*Essential work*" means—

"work appearing to the Minister to be essential for the defence of the realm or the efficient prosecution of the war or to be essential to the life of the community."

Any such order may, in particular, provide—

(a) for securing that (save as provided by the order) employees *shall continue in that undertaking* and not be caused to give their services elsewhere ;

(b) for *prohibiting* employees *from absenting themselves* without reasonable excuse, or being *persistently late*, or *refusing to work reasonable overtime*, or *to work at times required*, or *to obey lawful commands* in relation to their work, or *impede the work of the undertaking* ;

(c) for requiring *payment* to employees of *wages* for periods when, though *work is not available in their usual occupation*, they are *capable of and available for work*, and *willing to perform* services which they can *reasonably be asked to perform* ;

(d) for *incidental and supplementary* matters for which *the Minister thinks it expedient to provide.*

Any such provision may relate, either *generally to undertakings* engaged in essential work, or to any *particular undertaking* or class or description of such undertakings. Such provision may also relate either *generally to persons employed* in such undertakings or to any *particular person* or class or description of persons so employed.

#### 5. *Dismissal or Suspension*

An order may provide that where a person employed in an undertaking engaged in essential work—

<sup>1</sup> Paragraph (4) (a), (b), (c) and (d). A "specified person" need not be specified by name: "Persons can so be specified without being named provided they are unambiguously identified . . . To specify a class surely means no more than to designate a group of persons by reference to some common characteristic, which may be positive or negative. 'All barristers who have chambers in the Temple,' is, in my view, a perfectly good specification of a class . . ." *per Asquith, J.*, in *McMorran v. Marrisons* (1944), 2 All E.R. 448, 450, 451.

<sup>2</sup> Paragraph (4A), added by S.R. & O., 1941, No. 257.

(a) has been *dismissed for serious misconduct*; or  
 (b) has, under the conditions of his service, been *suspended without pay for disciplinary reasons*,  
 and, as a result of proceedings, the dismissal or suspension is treated as *ineffective or unjustified*, he will not be treated as "*not capable or available*" or *unwilling to perform services* which he could reasonably be asked to perform, because he has attended a hearing in the course of the proceedings or, if he was dismissed, because he has taken other employment.<sup>1</sup>

## II. ESSENTIAL WORK (GENERAL PROVISIONS) (No. 2) ORDER, 1942

Under reg. 58A, para. (4A), the Minister made an order laying down general provisions applicable to "essential work."<sup>2</sup>

### 1. *Scheduled Undertakings*

(i) *If the Minister is satisfied that—*

(a) an undertaking is engaged on *essential work*; and  
 (b) it is *expedient* for the defence of the realm or the efficient prosecution of the war or for maintaining supplies or services essential to the life of the community so to do;  
 he may enter the undertaking in a *Schedule of Undertakings* and must serve on the person carrying it on, a *certificate* that the undertaking is scheduled in respect of *specified persons*.<sup>3</sup>

(ii) *Before the Minister schedules an undertaking, he should consult such Government departments as appear to him to be concerned and take reasonably practical steps to satisfy himself—*

(a) that the *terms and conditions of employment* are not less favourable than the *recognised terms and conditions* provided by the Conditions of Employment and National Arbitration Order, 1940<sup>4</sup> (or by that order as amended);

(b) that *satisfactory provision for welfare* of employees exists, or is being made; and

(c) that *adequate provision for training* exists, or is being made, where, in his opinion, such provision should be made.<sup>5</sup>

A *provisional entry* may be made, and a *provisional certificate* served—in force for not more than six months. It may be renewed.<sup>6</sup> Any *certificate* may be cancelled by the Minister.<sup>7</sup>

### 2. *Statutory Conditions of Service*

To a scheduled undertaking four *conditions of service* apply<sup>8</sup>:

(a) The person carrying on the undertaking *must not dismiss* a person except for *serious misconduct* or, without dismissing

<sup>1</sup> Regulation 58A, para. (4B), added by S.R. & O., 1942, No. 1543.

<sup>2</sup> S.R. & O., 1942, No. 1594 (revoking S.R. & O., 1942, Nos. 371 and 687). The order applies, with modifications, to undertakings carried on by the *Crown* or by the *Government of any Allied Power* (art. 9 (1)). See also No. 1075 of 1943.

<sup>3</sup> Article 2 (1).

<sup>4</sup> S.R. & O., 1940, No. 1305.

<sup>5</sup> S.R. & O., 1942, No. 1594, para. 3 (1).

<sup>6</sup> Article 3 (2) and (3).

<sup>7</sup> Article 3 (4).

<sup>8</sup> Article 4 (1).

him, must not cause him to work for another undertaking (emergencies for fourteen days excepted), *except with the written permission of a national service officer.*

(b) A specified person *must not leave*, except with such *permission*.<sup>1</sup> Permission to terminate, or to leave employment will not take effect until the *date stated in the permission and this date must not be before seven clear days after the application for permission has been received at an employment exchange*.<sup>2</sup>

(c) *At least one week's notice must be given by either party, unless there was dismissal for serious misconduct.*

(d) A guaranteed wage must be paid for every *prescribed period*<sup>3</sup>—*the normal*<sup>4</sup> *wage for that prescribed period* if, during the *normal working hours*,<sup>5</sup> that person is—

(i) *capable of and available for work*<sup>6</sup>; and

(ii) *willing to perform services outside his usual occupation* which, in the circumstances, he can reasonably be asked to perform, when his usual work is not available.<sup>6</sup>

<sup>1</sup> Application should be in writing and should state the grounds (art. 4 (6)). Permission should be granted or refused within seven days of receipt of application, as far as practicable. See art. 9 and art. 9A (added by 1944, No. 815), on persons in scheduled undertakings, who are *excluded* from the Order.

<sup>2</sup> Added art. 4 (7) by The Essential Work (General Provisions) (Amendment) Order, 1944 (S.R. & O., 1944, No. 1467).

<sup>3</sup> A week, for a person paid on a *time rate*; otherwise, a *day*. "Week" means the *pay week* of the undertaking (art. 4 (1)).

<sup>4</sup> Calculated according to the *time rate* applicable to the person concerned, and to the normal working hours during the prescribed period. Where the wage cannot be calculated thus, it should be calculated according to the *time rate* applicable to *members of the same grade or class employed in the same undertaking and in the same district and to their normal working hours during the prescribed period*; if there is *no person so employed*, the criterion will be *members of the same grade or class in the same class of employment in the same district* (para. 4 (1)).

<sup>5</sup> That is, the hours exclusive of overtime ordinarily worked during that day or week by the grade or class of persons to whom the person concerned belongs.

<sup>6</sup> For the meaning of "*capable*," see Cases No. 6979 (1924) and No. 10910/30 (1930)—umpire's decisions under Unemployment Insurance Acts, 1920 and 1927. In the latter decision, the umpire cited from Decision 308, O.W.I. (1919):—

"That expression must be understood in its ordinary sense, meaning capable of doing work of a kind such as there may be some reasonable probability of obtaining. It is not sufficient that the workman should be capable of doing work under such conditions that there is no reasonable probability of his being able to obtain such work."

For the meaning of "*available*," see No. 11161/30 (1930):—

"Availability for work implies: (1) that the claimant is capable of performing work of such kind as is ordinarily done under contracts of employment and of doing it in conditions in which employees under contracts of service ordinarily do work (Decision 6979/20), for if a claimant is not so capable, it is obvious that he is not available for work; (2) that he is ready and equipped (if equipment be necessary) to take suitable employment as and when offered on proper terms and conditions (e.g., Decision 4952/20); and (3) that the claimant is not prevented from accepting such employment either by circumstances beyond his control, or by circumstances or conditions which he himself has created deliberately or by the neglect of duties or reasonable precautions."

To calculate the sum payable, *overtime* and *Sunday time* must be reckoned as paid for at the ordinary time rate.<sup>1</sup>

The Essential Work Order does not destroy the contract of service: the ordinary terms of the contract apply, except in so far as they are abrogated by the order.<sup>2</sup>

### 3. Effect of Suspension

If, under the conditions of his service, a specified person is *suspended without pay* for disciplinary reasons for not more than *three consecutive days*, then, if he is *not* paid on a *time rate* basis, art. 4 (1) (d) will not apply during suspension; if he is paid on a time rate basis, those provisions apply, reducing by the days of suspension the prescribed period and the normal working hours attributable to those days.<sup>3</sup> But if—

(i) within three days of the beginning of suspension, the person *requests a submission to a local appeal board*; and

(ii) (a) the board (after considering representations by or on behalf of the person carrying on the undertaking) *unanimously* thinks that the suspension was *not justified* or was justified for *part only of the period*; or

(b) where the board is *not unanimous*, a *national service officer* thinks that the suspension was *not justified* or was justified for *part only of the period*, the specified person will not be disentitled, merely because of the suspension, to the *guaranteed wage*, nor will he be regarded as “not capable or available,” or not willing to perform services which he could reasonably have been asked to perform, because of his attendance before the board.

### 4. Holidays

Normal working hours of a day or week during which a holiday occurs will be *treated as reduced by the holiday* and by the normal working hours attributable to the holiday.<sup>4</sup>

“*Holiday*” means a day *recognised as such in a particular scheduled undertaking*, generally, or as regards any persons or class or description of persons.<sup>5</sup>

<sup>1</sup> For the effect of *sickness*, see art. 4 (2) of S.R. & O., 1942, No. 1594.

<sup>2</sup> *Per* Goddard and du Parc, L.J.J., in *Alexander v. Tredgar Iron & Coal Company, Ltd.* [1944] 1 K.B. 390, 393.

<sup>3</sup> Article 4 (3).

<sup>4</sup> Article 4 (5).

<sup>5</sup> Article 1 (2). For the meaning of “*holidays*,” see Case No. 18284/32.

“1. Customary or recognised holidays are those days which the employers and workers concerned have agreed (whether expressly or by implication based upon acquiescence) shall be non-working days. Where those holidays have been defined and determined they become a normal incident of employment and an implied term of contracts of service which cannot be varied except by an express or implied agreement between the parties.

“2. The existence or duration of a recognised holiday in any particular establishment must be determined by the agreement or practice observed within that establishment.

“4. A recognised holiday implies a defined, certain and recurrent incident

A holiday does not become "recognised" by an employer's "unilateral decision" to treat it as such.<sup>1</sup>

### 5. Notice Suspending Guaranteed Wage

Where a person carrying on a scheduled undertaking *cannot provide work* for a specified person because other employees are taking part in an *illegal strike*,<sup>2</sup> he may give that person not less than *four days' notice* (excluding Sunday) of his intention to discontinue paying the guaranteed wage. As soon as he is able to provide work for the specified person he should give "*a notice that work is available*," specifying the day on which it will be available.<sup>3</sup>

Where a *notice suspending the guaranteed wage* has been duly given,

(a) the person carrying on the undertaking will *not be liable to pay* anything under art. 4 (1) (d) for "*the authorised suspense period*";

(b) "*prescribed period*" will exclude any day occurring during the authorised suspense period;

(c) *on giving the contractual notice*, the specified person may leave during the authorised suspense period, *without obtaining permission or giving notice* under art. 4 (1) (b) and (c);

(d) if a specified person who does not leave during the authorised suspense period, *fails*, without reasonable excuse, *to present himself* on the day work is available, his employment will be *deemed to have ended the day before*.<sup>4</sup>

### 6. Notice of Termination

The permission of a national service officer to an employee to leave, or to the employer to dismiss him, *does not affect the terms of the contract relating to notice or to length of notice*. But if the contract provides for less than one week, at least one week shall be given (under art. 4 (1) (c)). The contractual notice or the statutory week's notice may be given *before* the permission of a national service officer has been obtained.<sup>5</sup>

of employment, but the actual time when it is to be observed may be determinable by an employer alone or in conjunction with the workers concerned, e.g., a defined annual holiday need not be held in the same week or month each year.

"9. In the absence of an express agreement the existence or duration of a holiday in an establishment may be proved by facts and circumstances from which it can reasonably be inferred that there has been a practice to recognise the day in question as a non-working day and that this practice has been acquiesced in by the workers concerned."

<sup>1</sup> *Per* Lord Greene, M.R., in *Cummins v. Holloway Bros. (London), Ltd.* [1944] 1 K.B. 323, 326.

<sup>2</sup> Defined in art. 4 (5) (iii) as a strike in connection with a trade dispute unlawful under art. 4 of the Conditions of Employment and National Arbitration Order,

<sup>3</sup> Article 4 (5) (i).

<sup>4</sup> Article 4 (5) (ii).

<sup>5</sup> Article 4 (8).

### 7. Dismissal for Serious Misconduct

Dismissal for *serious misconduct*<sup>1</sup> is, in the first instance, *provisional only*. If—

(a) within the period specified in art. 5 (1), a specified person *requires* a national service officer to *submit* the matter to a local appeal board; and

(b) a national service officer *directs reinstatement*, or, *without so directing*, gives a notice under that paragraph, to the parties,

the dismissal will be treated as *ineffective* and, in the case of a notice, will be treated as *ineffective until the date when the notice was given*. If, however, the specified person does not, within the time allowed, require the submission, or if the national service officer notifies him and the employer that reinstatement will not be directed, or that he does not intend to give any notice, dismissal will be treated from the outset as operative.<sup>2</sup>

Where dismissal is treated as *ineffective*—

(a) the *guaranteed wage* must be paid from dismissal to reinstatement or to the date of notice (as the case may be);

(b) the specified person will not be treated as “not capable or available” or unwilling to perform services which he could reasonably have been asked to perform because he *attended* before the board or because he *took other employment*; in the latter case, any sums so earned will be deducted from

<sup>1</sup> Where “negligence” may be “*misconduct*,” see No. 2835/1927. A single negligent act may be “*misconduct*,” where a person is “chosen for his skill to perform duties requiring his constant personal attention,” e.g., where an electrical engineer in charge of plant on night shift went to sleep. Decision 3283/20; 4589/20. A recurrence or repetition of acts of negligence or mistake may amount to “*misconduct*”—

“where . . . the behaviour of the applicant shows a wanton or deliberate disregard of his employer's interests or of applicant's duties, or where his general conduct has been such that no reasonable employer could be expected to put up with it.”

For “*serious and wilful misconduct*,” see Workmen's Compensation Act, 1925, s. 1 (1) (b); Willis (1943), 35th ed., 153–155. The *misconduct* itself—as well as the consequences—must be serious: *Johnson v. Marshall* [1906] A.C. 409, 411, 412, per Lord Loreburn, L.C., where the mere breach of a rule prohibiting the use of a lift without a load was not “serious” misconduct. “On the other hand,” continues Willis (at 53), “where there is a deliberate and unmistakable act of disobedience to an express order, or where there is a deliberate breach of a law or rule, which is framed in the interests of the workmen and for securing their safety, it will usually be held that such a breach or such disobedience amounts to serious misconduct; but there can be no rule of law on the point, and each case must be determined on the facts: *George v. Glasgow Coal Co.* [1909] A.C. 123.”

“A lack of interest or enthusiasm is not . . . serious misconduct”: per Asquith, J., in *McMorran v. Marrisons* (1944), 2 All E.R. 448, 452.

<sup>2</sup> Article 4 (8) substituted by 1944, No. 815. By S.R. & O., 1943, No. 1075, “the national service officer,” throughout this order, became “a national service officer.”

the amount of the guaranteed wage to which he may be entitled *during any prescribed period falling within the period between dismissal and reinstatement, or dismissal and notice.*<sup>1</sup>

### 8. Local Appeal Boards

A national service officer may be requested to submit the following types of case to a local appeal board where—

(a) the *person carrying on an undertaking* or any specified person who applied, or on whose behalf an application was made, is *aggrieved* because the national service officer has *given or refused permission* ;

(b) a specified person has been *dismissed for serious misconduct*.

The request should be made in writing within seven days of the grant or refusal of permission, or of the dismissal.<sup>2</sup>

A national service officer must *forthwith submit* the matter to the board who, as far as practicable within seven days, must *make their recommendation*.<sup>3</sup> After considering their recommendation, a national service officer may *cancel permission*, or *grant or refuse permission*, or *direct* a specified person to *return* to his work, or *direct the reinstatement* of a person whose employment has been terminated under a permission so cancelled, or *direct the reinstatement* of a person dismissed for serious misconduct if the board thinks that the dismissal was not justified on that ground. In the last case *without directing reinstatement*, he may give the parties *notice that the board is of the above opinion*.<sup>4</sup>

*Local appeal boards* sit for such districts as are determined by the Minister.<sup>5</sup> They consist of one member representing employers, one member representing workers, and a chairman appointed by the Minister.<sup>6</sup> A local appeal board, consisting of the *chairman and one other member* will, however, be deemed to be properly constituted if—

(a) the chairman thinks fit ; and

(b) the person making the request *consents* ; and

(c) the *other person* concerned, if *present*, *consents*.<sup>7</sup>

Viscount Simon, L.C., recently declared, in another context :—

“ Unless Parliament otherwise enacts, the duty of considering the defence of a party accused, before pronouncing the accused to be rightly adjudged guilty, rests on any

<sup>1</sup> Article 4 (10) substituted by 1944, No. 815, art. 2.

<sup>2</sup> Article 5 (1). The period may, for good cause, be extended.

<sup>3</sup> Article 5 (2).

<sup>4</sup> Article 5 (3), substituted by 1944, No. 815, art. 3.

<sup>5</sup> Local Appeal Boards (like Courts of Referees) are *administrative tribunals* : *Collins v. Henry Whitley & Co.* [1927] 2 K.B. 378, 383, *per* Horridge, J.

<sup>6</sup> Article 5 (4). *Panels* of representatives of workers and employers are constituted, from which members are selected.

<sup>7</sup> Article 5 (5).



tribunal, whether strictly judicial or not, which is given the duty of investigating his behaviour and taking disciplinary action against him. The form in which this duty is discharged—e.g., whether by hearing evidence *viva voce* or otherwise—is for the rules of the tribunal to decide. What matters is that the accused should not be condemned without being given a fair chance of exculpation.”<sup>1</sup>

Of “natural justice,” by the rules of which an administrative tribunal is governed, Lord Wright observed in *The Spackman Case*<sup>2</sup> that the term is admittedly “sadly lacking in precision,”<sup>3</sup> but it is “not desirable to attempt to force it into any procrustean bed”<sup>4</sup>; the essential requirements are that the tribunal should be impartial and that the parties should be given “a full and fair opportunity of being heard.”<sup>4</sup>

“If the principles of natural justice are violated in respect of any decision, it is, indeed, immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be no decision.”<sup>5</sup>

#### 9. Resumption ; Reinstatement ; Discharge without Permission

(a) Where a national service officer has given permission to discharge an employee, who is accordingly discharged, but subsequently, after appeal before the local appeal board, the officer *cancels* permission, and the employee *resumes work*, the employee is *not entitled to wages for the intervening period* : *Docker v. Standard Telephones and Cables, Ltd.*<sup>6</sup>

Once permission is granted, employment may be lawfully terminated.<sup>7</sup> Subject to the minimum notice, the terms of the contract relating to notice remain in force.<sup>8</sup>

(b) Where, *on the ground of redundancy*, permission was granted to terminate employment after a recommendation by the local appeal board, and the national service officer *revoked* permission and *directed reinstatement*, but, *no work being available*, the

<sup>1</sup> *General Medical Council v. Spackman* [1943] A.C. 627, 635, 636. See also *per* Lord Loreburn, L.C., in *Board of Education v. Rice* [1911] A.C. 179, 182, approved in *Local Government Board v. Arlidge* [1915] A.C. 120. See *per* Viscount Haldane, L.C., at 132: “They must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must be come to in the spirit and with the sense of responsibility of a tribunal whose object is to mete out justice.”

<sup>2</sup> [1943] A.C. 627, 640.

<sup>3</sup> Cited by Lord Wright from the judgment of Hamilton, L.J., in *R. v. Local Government Board, ex parte Arlidge* [1914] 1 K.B. 160, 199.

<sup>4</sup> [1943] A.C. 644. See also *Report of Committee on Ministers' Powers* (1932), Cmd. 4060, 75–80, 99–100.

<sup>5</sup> [1943] A.C. 644, 645.

<sup>6</sup> [1943] 1 K.B. 92. The case was decided under the 1941 Order, but the material words are re-enacted in the 1942 Order.

<sup>7</sup> Article 4 (1) (a).

<sup>8</sup> Article 4 (4).

employee was not admitted to the premises or allowed to work, but was paid at the same rate of wages, the employers had not failed to comply with the direction: *Hodge v. Ultra Electric, Ltd.*<sup>1</sup>

It was argued on appeal that "reinstatement" connotes the right to work, as well as the right to be paid: the employer must not merely be ready and willing to provide work, but must provide it. For the employer it was contended that the employee had been reinstated in her "employment": they did everything possible "to reinstate" her. Croom-Johnson, J., said: "The obligation on the employer is an obligation to give work if there is work available, and not an absolute obligation to give work when there is none in fact."<sup>2</sup>

(c) Where an employee was *dismissed without permission* of the national service officer, the *dismissal was of no effect*; he was *entitled to his wages* until new employment became available, but he was not entitled to have his new earnings made up to his former rate of pay: *George v. Mitchell & King*.<sup>3</sup>

From January until 26th March, 1942, G was an engineer foreman in a company manufacturing munitions. Being away ill for a day, his employers put another foreman in his place and when he returned they told him they did not require him. The national service officer refused leave to dismiss, and this refusal was confirmed by the local appeal board. They did not reinstate him as foreman, but continued to pay him, from March onwards, his wages for several weeks, until on 12th May they offered him work as an operative at £8 per week. He was willing to do the work, but insisted on the right to his wage of £11 per week. As from 8th May his employers stopped his wages. On 15th June the man-power board found him a temporary job at £8 per week which lasted until 31st August. He claimed £92 2s. 10d. arrears, and a declaration: (1) that his employers were not entitled to terminate his contract, save as provided by the order; (2) that if work as a night foreman were not available, he was entitled to £11 per week for other work. The county court refused both declarations.

The appeal was allowed. The court gave the plaintiff judgment for £66, but made no declaration. Contractual rights and duties, said Scott, L.J.—save in so far as they are altered—are preserved. "The right of action for wages is also clothed

<sup>1</sup> [1943] 1 K.B. 463.

<sup>2</sup> *Ib.*, referring to *Turner v Sawdon & Co.* [1901] 2 K.B. 653, 656, 657.

<sup>3</sup> (1943), 1 All E.R. 233. See also *McMorran v. Morrisons* (1944), 2 All E.R. 448, 452, where Asquith, J., awarded arrears of wages to a general foreman who was wrongfully dismissed in contravention of the Essential Work (Building and Civil Engineering) Order, 1942 (S.R. & O., 1942, No. 2044), in respect of the period from his "ostensible dismissal" until he obtained other employment.

with statutory force.”<sup>1</sup> The right to dissolve the contract is not annulled, but is subject to leave of the national service officer and to the condition that without leave, the duty to pay the normal wage will continue if the employee and his proper work are “available.” He has his “contractual right of action for wages” and an additional right to sue on the order as for a statutory debt.<sup>2</sup> He was entitled to £11 per week for six weeks from 8th May until 18th June. Since he took service with another master, the presumption that he left the service of his first master must prevail. MacKinnon, L.J., made scathing comment on the “statutory order” :—

“If the employers, who, presumably, know their own business, want to replace a man they regard as incompetent by one who is more efficient, and are forbidden to do so, in seven or fourteen days, by those who cannot have been able to form a reasonable judgment on the merits of their claim, I cannot imagine anything less calculated to conduce to the smooth and effective conduct of an essential business ‘for the efficient prosecution of the war, or for maintaining supplies or services essential to the life of the community.’ ”<sup>3</sup>

It should be observed, however, with respect, that courts of referees, containing members with technical knowledge—which sit, in effect, as the local appeal boards—have been deciding since 1920 similar questions under the Unemployment Insurance Acts, and have acquired wide experience in similar disputes.

Goddard, L.J. (as he then was), observed :—

“If the employment cannot be terminated, it remains in force with all its consequences ; the employed person remains in the service, and consequently has a right to his wages, and it is only fair that he should have the right as he cannot enter employment elsewhere unless and until he gets permission of the national service officer.”<sup>4</sup>

The court must infer that the national service officer consented to the taking of the employment found by the man power board. The plaintiff was not entitled to the difference in wages ; that “would, in effect, give him an annuity for the rest of the war, and I cannot think that the order was intended to have any such effect.”<sup>5</sup> As soon as he entered the new firm his former contract was at an end. The order did not entitle him to claim damages for wrongful dismissal, but merely to be paid the normal wage as long as he remained in his employment.

(d) *Reinstatement* means restoration to the position formerly occupied : *William Dixon, Ltd. v. Patterson*.<sup>6</sup>

<sup>1</sup> (1943), 1 All E.R., at 237.

<sup>2</sup> *Ib.*, citing *Shepherd v. Hills* (1855), 11 Ex. 55, 66, 67, per Parke, B., and *Cohen v. Hall* [1922] 2 K.B. 37.

<sup>3</sup> *Ib.*, 238.

<sup>4</sup> *Ib.*, 239.

<sup>5</sup> *Ib.*, 240.

<sup>6</sup> [1943] S.C. (J.) 78.

Coalmasters carrying on a scheduled undertaking, dismissed an under-manager on the ground of "serious misconduct," viz.: absence without due notice. The national service officer, after appeal to the local appeal board, directed them to reinstate him. They took him back, but he was not restored to his position but was asked to take work as an on-cost worker at reduced emoluments: this work he accepted. The sheriff-substitute found that the company had failed to comply with the direction.

On appeal it was argued that the order applied only to "workers" and not to officials such as under-managers, and that "reinstatement" meant reinstatement in the undertaking, not necessarily in the employee's previous position. Alternatively, the Essential Work (Coalmining Industry) Order, 1941,<sup>1</sup> was *ultra vires*. The respondents contended that reg. 58A para. (4), covered the whole industrial field. "Worker" was wider than "workman" and included all employees. The order, in return for loss of liberty, guaranteed security of employment. The order was *intra vires* the regulation which gave almost unlimited power to direct all persons in Great Britain. Lord Justice-Clerk (Cooper) said:—

"The natural and primary meaning of "to reinstate" as applied to a man who has been dismissed (*ex hypothesi* without justification) is to replace him in the position from which he was dismissed, and so to restore the *status quo ante* the dismissal."<sup>2</sup>

To interpret "reinstatement" as meaning "re-employment in any capacity" would "largely frustrate the purpose" of the order. Paragraphs (4) and (4A) cover "the entire field of the nation's industry by two classifications which plainly have the same meaning—(a) 'employers' and 'workers,' and (b) 'persons carrying on any undertaking' and 'persons employed in that undertaking.'"<sup>3</sup> There was no warrant for the distinction between "manual labour" and "managerial, clerical or technical services."

Lord Cooper's definition of "reinstatement" was approved by Humphreys, J., in *Jackson & Fisher's Foils, Ltd.*<sup>4</sup>: it was not sufficient compliance with a direction to reinstate, merely to put an employee on the pay roll without providing him with work, unless the employers proved that no work was available.<sup>5</sup>

"... a man is not 'reinstated in his employment' when he is just put on the pay roll, any more than it could be argued that a man was reinstated in his employment if what the employer did was to say: 'We will not let you come near the

<sup>1</sup> S.R. & O., 1941, No. 2096.

<sup>2</sup> [1943] S.C. (J.), at 85.

<sup>3</sup> *Ib.*, at 86.

<sup>4</sup> [1944] 1 K.B. 316.

<sup>5</sup> As in *Hodge v. Ultra Electric, Ltd.* [1943] K.B. 462; *supra*, 375.

premises, but we will give you a pension for life equal to the wages you were getting before.'"<sup>1</sup>

#### 10. *Absenteeism and Persistent Lateness*

Without reasonable excuse, a person *must not be absent or persistently late*.<sup>2</sup> Where he has been absent or persistently late, the person carrying on the undertaking may *report* the matter to a national service officer, who will require it to be referred to the *works committee or other joint council* (if, in his opinion, they can appropriately deal with the matter).<sup>3</sup> Reference to that committee and a report from them after giving the person affected an opportunity of making representations, are conditions precedent to prosecution.<sup>4</sup>

#### 11. *Disobedience of Lawful Orders*

If a specified person fails to comply with any *lawful and reasonable orders* (including the working of day or night work, and reasonable overtime), the person carrying on the undertaking may report the matter, with particulars, to a national service officer.<sup>5</sup> He will communicate the particulars to the person affected, and if, *after such further investigation as he thinks necessary*, he is satisfied of *the truth* and that the person is *capable of performing the work*, *he may direct that person to perform his work*. The direction may provide for the method and manner of the work, and the times and the period of work.<sup>6</sup>

The person directed may, within seven days (or such further period as may, for good cause be allowed), require a national service officer to submit the matter to a board for *report and recommendation*. The submission must be made; the board must make its recommendation (so far as practicable) within seven days, and send a copy to the person directed and to the person carrying on the undertaking.<sup>7</sup> The officer must take the recommendation into consideration and may then give such *directions* as he thinks fit, or *withdraw* directions he gave.<sup>8</sup>

### III. ESSENTIAL WORK ORDERS

The Essential Work (General Provisions) (No. 2) Order, 1942,<sup>9</sup> may be applied, *subject to modifications*, to any *particular class of undertaking* and to the *persons employed there*.<sup>10</sup>

Essential Works Orders have been made for the following :

Building and Civil Engineering ; Chain Manufacturing ;

<sup>1</sup> [1944] 1 K.B., at 321, 322.

<sup>2</sup> Article 6 (1).

<sup>3</sup> Article 6 (2).

<sup>4</sup> Article 6 (3). For the purpose of art. 6A, the opinion of the national service officer, that "an appropriate committee" exists, is conclusive: *Conway v. Stocks* [1943] 1 K.B. 438, 441, *per* Viscount Caldecote, C.J.

<sup>5</sup> Article 7 (1).

<sup>6</sup> Article 7 (2).

<sup>7</sup> Article 7 (3).

<sup>8</sup> Article 7 (4).

<sup>9</sup> S.R. & O., 1942, No. 1594; *supra*.

<sup>10</sup> Article 10. Upon *Dock Labour Orders*, see 10 L.J.N.C.C.R. 93, 135, 142.

Coal Mining; Cotton Manufacturing; Dock Labour; Electrical Contracting; Iron and Steel Industries; Merchant Navy; Shipbuilding and Repairing.<sup>1</sup>

#### IV. DEFENCE (GENERAL) REGULATION 58AA

For this regulation, made to prevent the interruption of work by "trade disputes," and for *The Conditions of Employment and National Arbitration Order, 1940*,<sup>2</sup> made under it, see *supra*, 78, 79.

An (Amendment) Order, 1944,<sup>3</sup> amends the principal order. Questions arising under Pt. III of that order *must be reported to the Minister within twelve months* of the date on which the question first arose.<sup>4</sup>

An award made under arts. 1-3 may be made *retrospective* to a specified date, not earlier than the date of reference. Where the National Arbitration Tribunal is satisfied that the employer was aware of the "recognised terms and contracts" and also before the date of the reference "was aware or ought to have been aware that those conditions should have been observed by him, the award shall be retrospective to the date of knowledge." The Tribunal's decision as to the "*effective date of the award*" is conclusive.<sup>5</sup>

Where, in consequence of a report made under arts. 1-4, the tribunal has made an award, then from the effective date of the award it will be (or will be deemed to have been) an *implied term* of the contract between the employer and the workers concerned that the *rate of wages* and the *conditions of employment* (until varied by agreement, decision or award, as mentioned in arts. 1-4) shall be in accordance with the award.<sup>6</sup>

The result of the amendment on retroactivity is to modify the effect of *Hulland v. William Sanders & Son*.<sup>7</sup> Where an employer has paid a lower rate of wages than those settled by "the machinery of negotiation or arbitration" under art. 5, para. 1, a right of action does not arise for arrears of wages or for damages for breach of statutory duty. The question whether an employer is in default may be reported to the Minister under para. 3, and shall then by him be referred to the tribunal under art. 2. *Only when an award has been made does it become an implied term*

<sup>1</sup> For list, see Krusin & Rogers, IV, 196; V, 291.

<sup>2</sup> S.R. & O., 1940, No. 1305, amended by 1941, No. 1884, and S.R. & O., 1942, Nos. 1073 and 2673.

<sup>3</sup> S.R. & O., 1944, No. 1437.

<sup>4</sup> Article 5, para. (3).

<sup>5</sup> Article 5, para. (4), a substituted paragraph.

<sup>6</sup> Article 5, para. 4A)

<sup>7</sup> [1945] 1 K.B. 78. Lord Greene, M.R., MacKinnon and du Parcq, L.JJ., reversing a judgment of Humphreys, J., following the dictum of Parke, B., in *Shepherd v. Hills*, 11 Ex. 55, 67.

of the contract that the rate of wages shall be in accordance with the award so as to enable the worker to sue (para. 4).

If the workman's right to sue existed independently of an implied term brought into existence by an award, said *du Parc*, L.J. (for the Court of Appeal), he could demand arrears without regard to the date from which the implied term began to be operative; the elaborate provisions for the employer's protection would be nugatory.<sup>1</sup> The employer might be ordered by the court to pay sums exceeding any which the National Arbitration Tribunal thought he ought to be called on to pay.<sup>2</sup> Concurrently "different irreconcilable" decisions might thus be given upon, the question whether the terms and conditions which the employer observes are not less favourable than the recognised terms and conditions.<sup>2</sup> Under Art. 5, para. 3. the only tribunal which has jurisdiction to decide a question which has arisen under that paragraph is the National Arbitration Tribunal. Until its decision, neither employers nor workmen know how the question will be answered: the employers cannot be in default.

The amendment empowering the tribunal to fix a retrospective date, will enable the workman, it is thought, to sue for arrears.

## B. SEAMAN'S CONTRACT OF SERVICE

### 1. Alteration of Risk

If, during a voyage undertaken in time of peace, the country in whose service the captain is, declares war so as to expose a British seaman under articles to greater risks than he has contracted to run, he is entitled to leave the ship and to claim the full amount of his wages: *O'Neill v. Armstrong*.<sup>3</sup>

A seaman had contracted to serve on board a voyage from Newcastle to Yokohama. The *Tatsuta* was a Japanese torpedo gunboat and the captain (so the judge found) was in the service of his government: on sailing, he hoisted the Japanese flag. At Aden the crew were informed that Japan had declared war on China and the captain said the run was at an end. The seaman had become exposed to two additional risks—one from the Chinese, the other under the Foreign Enlistment Act. He had a right to leave the ship; since it was the fault of the defendant's principals that the voyage was not completed, wages could be claimed for the whole voyage.

### 2. Damages include Maintenance

Where British seamen had signed for a commercial voyage from Cardiff to ports (including Hong Kong), knowing that Russia and Japan were at war, that the ship was to carry coal

<sup>1</sup> *Ib.*, [1945] 1 K.B., at 84.

<sup>2</sup> *Ib.*, 85.

<sup>3</sup> [1895] 2 Q.B., 418, 421, affirming [1895] 2 Q.B. 70, 76. For employment in British ships, see regs. 45A, 45B; *McNair*, 229-232; 65 L.Q.R. 186-189.

to Hong Kong, and that coal was contraband, the seaman were justified in refusing to go to Japan at the risk of capture. They were entitled, until final settlement, to wages and to the cost of maintenance: *Palace Shipping Co., Ltd. v. Caine*.<sup>1</sup>

"A voyage with a contraband cargo, across seas which are admittedly the theatre of war, to a port belonging to one of the belligerents which is itself a naval base . . . is *prima facie* not an ordinary commercial voyage of a peaceful nature."<sup>2</sup>

### 3. Extra Remuneration to complete Voyage

Where British seamen, engaged during peace, on a British ship for a commercial voyage from London to Port Arthur, Texas and back, refused, in August, 1914, to proceed without extra remuneration from Port Arthur (a German cruiser being in the vicinity), on account of the extra risk (including a risk of mines), they were discharged from their obligation to proceed, and the master was impliedly clothed with authority to make a reasonable contract with his crew for extra remuneration: *Liston v. Owners of Steamship Carpathian*.<sup>3</sup>

### 4. Detention of Ship in Enemy Port

Where a British ship, during a voyage for which British seamen, in May, 1914, had signed articles for two years, was in Hamburg when war was declared, and had been detained since 4th August, 1914, the crew being imprisoned in Ruhleben, the contract became impossible of performance on 4th August, and the seamen ceased to be entitled to wages: *Horlock v. Beal*.<sup>4</sup>

It was contended that a seaman's wages stand on a special footing.<sup>5</sup> Earl Loreburn agreed that towards seamen's contracts of service the law has always been "in some respects peculiarly tender and benevolent," save for the "cruel exception," since removed by s. 157 of the Merchant Shipping Act, 1894, that "freight is the mother of wages." The crew and co-owners were regarded as co-adventurers—as in *Beale v. Thompson*<sup>6</sup>—but a seaman is now entitled to his wages whether freight be earned or not. This exception, however, must still be remembered in considering the older decisions.

<sup>1</sup> [1907] A.C. 386. See *Amrutlal Ojha Co., Ltd. v. Embiricos* (1943), 76 Ll. L. Rep. 175.

<sup>2</sup> *Ib.*, 386, per Lord Atkinson, who dissented concerning the amount recoverable. See *Robson v. Sykes* (1938), 2 All E.R. 612.

<sup>3</sup> [1915] 2 K.B. 42, 48, per Lord Coleridge, J.

<sup>4</sup> [1916] 1 A.C. 486 (Lord Parmoor dissenting). Earl Loreburn held that the material date was the date of the imprisonment of the crew.

<sup>5</sup> See argument for respondent on 490, citing (*inter alia*) *Chandler v. Grieves* (1792), 2 H. Bl. 606n; s. 134 (c) of the Merchant Shipping Act, 1894.

<sup>6</sup> (1804), 4 East 546; the detention there, moreover, was, on the facts, temporary. So, also, in *Hadley v. Clarke* (1799), 8 Term Rep. 259, 265, 267.



"It was an implied term of this service, subject to any special law affecting seamen, that it should be practicable for the ship to sail on this voyage, in that sense which disregards minor interruptions and takes notice only of what substantially ends the possibility of the service contemplated being fulfilled."<sup>1</sup>

Lord Shaw pointed out that for the owners to trade with the enemy was illegal; for the crew it was illegal to assist in such trade.<sup>2</sup>

"Without fault on the part of either party to the contract of service, law and force combined to stop the prosecution of this voyage and the adventure was completely lost . . . that stoppage and loss, having arisen from a declaration of war, must be considered to have been caused for a period of indefinite duration, and so to have effected a solution of the contract arrangements for and dependent upon the completion or further continuance of the adventure."

The declaration of war brought this contract to an end despite the possibility of an early peace—for that would only leave parties in suspense. What might happen to the ship no one could foresee—destruction, confiscation, or return.

"The underlying *ratio* is the failure of something which was at the basis of the contract in the mind and intention of the contracting parties."

### C. REINSTATEMENT IN CIVIL EMPLOYMENT ACT, 1944

A comprehensive system of reinstatement has been set up by the Reinstatement in Civil Employment Act, 1944, which came into operation on 1st August, 1944.<sup>3</sup>

#### I. WHO IS WITHIN THE ACT

The Act applies to—

- (a) *male* persons who, after 25th May, 1939, enter whole-time service in the *armed forces* ;
- (b) *female* persons who, after this date, enter whole-time service in the *women's services* specified in Sched. I ;

<sup>1</sup> [1916] 1 A.C. 494.

<sup>2</sup> [1916] 1 A.C., at 507, 508, 510, 512, 514. Lord Atkinson's speech contains a review of the authorities (at 495-506).

<sup>3</sup> Section 24 (3); Sched. III; s. 14 (4) of the 1939 Act is preserved. Section 14 otherwise is repealed; reg. 60DAA is revoked. No liability to reinstate can arise before 1st August, 1944: *O. V. Linton v. Corts, Ltd., Leicester* (R.E. Code 1, Case No. 4); *Norman Brooks v. Manchester Collieries, Ltd.* (Case No. 10).

See also Disabled Persons (Employment) Act, 1944, which imposes upon persons who have "a substantial number" of employees, the duty to give employment to a quota of persons registered "disabled persons" (ss. 9, 10). The Minister of Labour and National Service may "designate" classes of employment, vacancies in which are to be given to such registered disabled persons only (ss. 12, 13).

(c) *all persons who, after 10th April, 1941, under enrolment notice within National Service Acts, 1939 to 1942, enter whole-time service in a civil defence force.*<sup>1</sup>

Where a person to whom the Act applies, whose war service has ended, *again enters upon whole-time service*, his *previous service*, for the purposes of the Act, will be treated as *continuing* without intermission until the end of the subsequent service.<sup>2</sup>

Where a person whose war service has ended, performs *whole-time services under direction or written request of the Minister* (or performs such services which he was released or discharged to perform), *this period of whole-time service* will be treated as if it were a further period of service within s. 6 (1).<sup>3</sup>

These two periods will *not be conjoined* where the interval *exceeds twenty-six weeks*, or where, during the interval, *either*

(a) the period mentioned in s. 2 (2) for making application has expired since the end of the first period, without the applicant's application to his former employer ;

(b) his former employer has made employment available and he has failed without reasonable excuse to take it, or has left it otherwise than to undertake war service.<sup>4</sup>

If a person comes within the Act, but his war service ended *not more than twenty-six weeks before 1st August, 1944*, the Act will apply to him as if his service had ended immediately after 1st August, 1944. Where, on 1st August, 1944, he is in the employment of his former employer he will be treated as having entered that employment immediately after that date in pursuance of an application made under s. 1.<sup>5</sup>

The "*former employer*" who is under a duty to reinstate means the employer by whom the person concerned was *last employed within the last four weeks* before his war service.<sup>6</sup>

## II. OBLIGATION TO REINSTATE

A *statutory obligation to reinstate* is imposed upon the former employer.<sup>7</sup> There are certain *conditions precedent* : the former employee must be a person to whom the Act applies ; his

<sup>1</sup> Section 6 (1). See further, upon "whole-time service," s. 20 (4)-(8).

Service in the Merchant Navy is not "war service" within the Act : *M. P. Giles v. Messrs. S. J. Etherington* (Case No. 1).

For a case of whole-time naval service, see Case No. 3, *Hugh Vaudrey v. Somerset Rivers Catchment Board*.

<sup>2</sup> Section 12 (1).

<sup>3</sup> Section 12 (2). This includes undergoing of training : s. 20 (2).

<sup>4</sup> Section 12 (3).

<sup>5</sup> Section 13 (1).

<sup>6</sup> Section 7 (1). See subs. (2), for cases where a change takes place in the "undertaking" (s. 20 (1)), or the undertaking becomes "comprised" in any other undertaking. See *Albert Victor Baird v. Bowlers, Ltd., now Biterspray Products, Ltd.* (Case No. 9) ; *Terence Welsh v. Wm. Hood Scott* (Case No. 17), where the former employer had made a genuine transfer of his business.

<sup>7</sup> Section 1.

war service must end after the Act comes into operation (1st August, 1944)<sup>1</sup>; he must apply to be taken back<sup>2</sup>; the application must be in force. These conditions complied with—the application, however, may be *waived or dispensed with* by the former employer<sup>3</sup>—the statutory obligation arises. The obligation is to take the applicant back—

(a) *in his last occupation*<sup>4</sup> before his war service began and on terms and conditions not less favourable than he would have enjoyed if he had not come within the Act; or

(b) if it is *not reasonable and practicable*<sup>5</sup> to take him back into that occupation and on those terms and conditions, “*in the most favourable occupation and on the most favourable terms and conditions which are reasonable and practicable in his case.*”<sup>6</sup>

Restrictions on engagements imposed by certain Essential Works Orders will not apply where the obligation is imposed.<sup>7</sup>

The obligation is to take the applicant back—

*at the first opportunity at which it is reasonable and practicable for his former employer to do so on or after the date when he is notified, under s. 3, that the applicant will be available.*

No obligation arises until before the date on which the applicant notifies his former employer that he will be available.<sup>8</sup>

“*Failure to notify a date on which the applicant will be available, invalidates the application, unless the employers, in writing, waive the requirement.*”<sup>9</sup>

This notification must be given *not later than four weeks after the last date for making the application.*

<sup>1</sup> Subject to s. 13 (1): The Reinstatement in Civil Employment (Commencement) Order, 1944 (S.R. & O., 1944, No. 879).

<sup>2</sup> In The Reinstatement in Civil Employment (Procedure) Regulations, 1944 (S.R. & O., 880), “reinstated” is defined as “taken into the employment of an employer in pursuance of an application for reinstatement or under such circumstances that such an application has been waived or dispensed with” (para. 1 (3)).

<sup>3</sup> Section 15 (1); *Faudry v. Somerset Rivers Catchment Board*, *supra*, 383, note 1.

<sup>4</sup> The words are “plain and unqualified.” They do not mean “the permanent occupation” or “the last occupation”: *Horae Stanley Cubitt v. Balby and Holdinstein, Ltd.* (Case No. 14). See also *Donald Edward Smith v. Bucks County Education Committee* (Case No. 16).

<sup>5</sup> See *Ronald Agar Godwin v. Hotchkiss & Son* (Case No. 11), where the employers unsuccessfully set up their financial position, and the fact that they had no electric welding contracts on hand, or in view.

The onus of proving that the employment offered is not suitable to the applicant's health is upon the applicant. *Simpson Ethelbert Holland v. London Passenger Transport Board* (Case No. 18).

<sup>6</sup> Section 1 (1).

<sup>7</sup> The Reinstatement in Civil Employment (Exemption from Restriction) Order 1944 (S.R. & O., 1944, No. 902, art. 2; Sched., Pt. I).

<sup>8</sup> See *C. V. Linton v. Gorts, Ltd., Leicester* (Case No. 4).

<sup>9</sup> *William George Terry v. Autar Taxis (Torquay), Ltd.* (Case No. 13).

The date of availability must be *within those four weeks*; if, *owing to sickness or other reasonable cause*, the applicant is not available, the date must be as soon as reasonably possible.<sup>1</sup>

If the former employer, after giving reasonable notice, makes such employment available to the applicant at the first opportunity, his statutory obligation is thereupon discharged.

*With two provisos:—*

(a) An "opportunity" is *not deemed to have arisen if—*

(i) the former employer makes employment available, "but the applicant has, or reasonably believes that he has, *reasonable cause for not taking it*"; and

(ii) the grounds of this "reasonable cause" are notified in writing to the former employer as soon as possible after the former employer's notification that employment is being made available; and

(b) The former employer will *in no case* be under obligation under this section,<sup>2</sup> to take the applicant back after *six months from the end of the present emergency*.<sup>3</sup>

### III. APPLICATION FOR REINSTATEMENT

An application must be made *in writing*, either *by the applicant or a person with his authority*.<sup>4</sup> Unless it is made *during the period* beginning with the end of the applicant's war service and ending with the fifth Monday after the end of that service, it is of no effect, *unless the applicant was prevented from making it by sickness or other reasonable cause, and the application was made as soon as reasonably possible after that period expired*.<sup>5</sup>

An application will *cease to have effect after thirteen weeks from the date when it was made*; save that—

(a) while it is in force, it may, from time to time, be *renewed* by the applicant or his agent, and will then cease to have effect *thirteen weeks from the date of renewal*; and

(b) if, when its validity would have ceased, proceedings under the Act are pending, the application will remain valid until fourteen days after those proceedings are concluded;

<sup>1</sup> Section 3 (1). Upon the "reasonable and practicable," see *Albert Victor Baird v. Bowlers, Ltd., now Bitterspray Products, Ltd.* (Case No. 9).

<sup>2</sup> Under s. 9 (2) (a), however, an order may be made against him by a reinstatement committee, requiring him to take the applicant back on a date more than six months after the end of the present emergency (Sched. II, para. 1).

<sup>3</sup> Section 1 (2). Upon the form of notice, see s. 1 (3). "The end of the present emergency" is defined in s. 20 (1).

<sup>4</sup> Section 2 (1).

<sup>5</sup> Section 2 (2). See *Terence Welsh v. Wm. Hood Scott* (Case No. 17): an application to a person who is not the "former employer," made in good faith in ignorance of the true circumstances, is "reasonable cause" for not making an application in time to the former employer.

this means after the time for appealing has expired or after an appeal has been decided or withdrawn.<sup>1</sup>

An application or renewal may be made or given *directly to the former employer or*, in the prescribed manner, *at an employment exchange*, or any other appointed local office of the Minister.<sup>2</sup> If the application or renewal is made or given at an exchange or local office, the Minister must forward it to the former employer.<sup>3</sup>

#### IV. OBLIGATION TO CONTINUE TO EMPLOY REINSTATED PERSONS

The former employer who, under s. 1, has taken back his former employee is *under a second statutory obligation; the obligation to continue to employ him for the following twenty-six weeks "or so much thereof as is reasonable and practicable"*—

(a) in an occupation *not less favourable than that in which the applicant has been taken back*, and on terms and conditions not less favourable; or

(b) if, during the period for which there is an obligation to continue to employ him, it ceases to be reasonable and practicable for him to be employed in that occupation and on those terms and conditions, "*in the most favourable occupation and on the most favourable terms and conditions which are thereafter for the time being reasonable and practicable in his case.*"

The statutory period, however, is *fifty-two weeks* where the applicant had been in *continuous employment with his former employer for a consecutive period of not less than fifty-two weeks.*<sup>4</sup>

Where the former employer carries on a *scheduled undertaking* under one of the specified *Essential Works Orders*, the provisions of those orders relating to (i) obtaining *permission to terminate employment*, (ii) *dismissal for serious misconduct*, (iii) *consequential appeals to a local appeal board*, will not apply for twenty-six weeks (or, where appropriate, fifty-two weeks) after reinstatement.<sup>5</sup>

#### V. PRIORITY OF CLAIMS TO EMPLOYMENT

It will *not* be regarded as "*reasonable and practicable*" for the former employer to reinstate the applicant if that can *only be done by discharging a person who—*

<sup>1</sup> Section 2 (3).

<sup>2</sup> *Sc. of Labour and National Service*: s. 20 (1).

<sup>3</sup> Section 2 (4). For prescribed forms, see *The Reinstatement in Civil Employment (Procedure) Regulations, 1944* (S.R. & O., 1944, No. 880).

<sup>4</sup> Section 4 (1). See s. 4 (2) upon period of "*continuous employment.*"

<sup>5</sup> *The Reinstatement in Civil Employment (Exemption from Restriction) Order 1944* (S.R. & O., 1944, No. 902), art. 3, Sched., Pt. II.

(a) was employed by him *before* the relevant date; and  
 (b) had been so employed before that date for a longer period than the applicant; and

(c) was so employed in employment of no less permanent a kind than the applicant's employment.  
 or by refusing to reinstate some other person within the Act who has duly made the prescribed application which is still in force.<sup>1</sup> The fact that the former employer can reinstate the applicant only by discharging some other person who is NOT such a person mentioned in paras. (a), (b) and (c), above, does not mean that reinstatement is not "reasonable and practicable." The applicant must be reinstated even if the other person is within the Act and whether he has been taken back or not.<sup>2</sup>

## VI. DETERMINATION OF QUESTIONS

### 1. Reinstatement Committees

*Reinstatement committees* will determine questions and make orders under s. 9.<sup>3</sup> These consist of three members: (a) a chairman selected by the Minister; (b) a person so selected from a panel of employers' representatives; (c) a person so selected from a panel of persons representing the employed persons.<sup>4</sup> Assessors may be appointed by the Minister, but they must not be party to any determination or order.<sup>5</sup> Appeals will be heard by the umpire or deputy umpires.<sup>6</sup>

### 2. Procedure

The committee will have the application sent to the former employer<sup>7</sup> with a request to receive within ten days his written observations, a copy of which will be sent to the applicant's last known address.<sup>8</sup> *Seven days' notice* of the hearing must be given

<sup>1</sup> Section 5 (1). "*The relevant date*" means the beginning of the applicant's war service. When some other person also is within the Act, "*the relevant date*" means whichever is the earlier date: the beginning of the applicant's war service, or the beginning of the other person's war service.

<sup>2</sup> Section 5 (2). See *C. V. Linton v. Corts, Ltd., Leicester* (Case No. 4).

<sup>3</sup> Section 9 (1). The application must be made (a) not later than fifty-two weeks after reinstatement; or (b) within thirteen weeks after an application, or a renewal application, for reinstatement, or within such further period as the chairman, for good cause, may allow. An application may, at any time, be withdrawn by written notice from the applicant. The Reinstatement in Civil Employment (Procedure) Regulations, 1944, para. 3, Sched., Pt. IV.

<sup>4</sup> Section 8 (1), (2). Compare the constitution of Courts of Referees under Unemployment Insurance Act, 1935, s. 41. A reinstatement committee has no power to award compensation under National Service (Armed Forces) Act, 1939, s. 14 (1), repealed by Sched. III of Reinstatement Act: *Norman Brooks v. Manchester Collieries, Ltd.* (Case No. 10).

<sup>5</sup> Section 8 (3).

<sup>6</sup> Section 8 (4).

<sup>7</sup> That is, "the person alleged by the applicant to be his former employer."

<sup>8</sup> S.R. & O., 1944, No. 880, para. 4 (1). The committee must adjourn the hearing, if the applicant requests, where a copy of these observations has not been sent within at least three days before the hearing.

to the applicant and to his former employer,<sup>1</sup> addressed to their last known addresses; such notice given, the committee may adjudicate<sup>2</sup> in the absence of the applicant or his former employer.<sup>1</sup> Any case, *with consent of the applicant and of his former employer, may be heard in the absence of one member of the committee, other than the chairman*; on a committee of two, the chairman has a casting vote.<sup>3</sup> No person may sit during a case where he appears for the applicant or for a person who is, or who is alleged to be, his former employer, or by which he is, or may be, directly affected, or in which he has taken part as an official of an association, a witness, or otherwise.<sup>4</sup> The applicant and any person who is, or who is alleged to be, his former employer, *may conduct his own case or may be represented—*

(a) by a representative of any organisation of employers or employed persons of which, at the date of his application, he was a member;

(b) by a relative or personal friend;

(c) in case of an employer, by a director, partner, manager, or any member of his staff; or

(d) by counsel or solicitor.<sup>5</sup>

The hearing must be in public unless "in any particular case for special reasons," the chairman directs that members of the public and representatives of any newspaper shall not be admitted or shall withdraw during the hearing, or any part of it.<sup>6</sup> To discuss their decision, the committee may order all other persons who are not members, to withdraw. The committee must keep a record of proceedings, including, for each case, *the facts found, the decision and the reasons*, and, where the decision is not unanimous, *the reasons given by the dissenting member*. The decision of the majority is the decision of the committee. A copy of the record will be supplied on request to the applicant, to any former employer affected, and to any person alleged by the applicant to be his former employer.<sup>7</sup> Apart from these provisions, the chairman of each committee determines its procedure.<sup>8</sup>

### 3. Jurisdiction to make Orders

Where the committee are satisfied that the former employer has made default in the discharge of his statutory obligations, the committee may make either or both of the following orders,

<sup>1</sup> That is, "the person alleged by the applicant to be his former employer."

<sup>2</sup> *Ib.*, para. 4 (2).

<sup>3</sup> *Ib.*, para. 4 (3).

<sup>4</sup> *Ib.*, para. 4 (4).

<sup>5</sup> *Ib.*, para. 4 (5). Contrast the absence of representation by counsel or solicitor (unless a relative or personal friend) before the Court of Referees, the Military Service (Hardship) Committee and the Local Appeal Board. On appeal to the umpire, representation by counsel or solicitor is permitted.

<sup>6</sup> *Ib.*, para. 4 (6). Again, contrast the hearings before the Court of Referees, the Military Service (Hardship) Committee and the Local Appeal Board.

<sup>7</sup> *Ib.* para 4 (7).

<sup>8</sup> *Ib.*, para. 4 (8).

"according as is in their opinion appropriate, having regard to all the circumstances of the case and the nature and extent of the default"—

(a) *an order requiring employment* (such as the committee regard as required by the Act) *to be made available*, specifying the date, occupation, terms and conditions,<sup>1</sup> and the place ;

(b) *an order for compensation* to the applicant for loss suffered or "likely" to be suffered through the default, being a *specified* sum, not exceeding the amount to which the committee thinks that the applicant would have been entitled for the period during which there was a statutory obligation of re-employment.<sup>2</sup>

#### (a) *Availability Order*

An availability order may be made *even after six months from the end of the present emergency*, and even though the date on which employment is to be made available is more than six months after the end of the present emergency.<sup>3</sup> The order will be made against the person who, when the order is made, was the former employer, and *he* must secure compliance.<sup>4</sup> Where the former employer, under such an order, takes the applicant back, the Act applies to the applicant as if he had been taken back under s. 1 ; if, however, since the end of his war service, the applicant has already been in his former employer's employ, the period of twenty-six or fifty-two weeks (as the case may be) will be correspondingly reduced.<sup>5</sup> Where, under such an order, the former employer makes employment available but the applicant, through sickness or other reasonable cause, cannot take it, the former employer will be under the same obligation as he would have been under, if the employment had been made available under s. 1.<sup>6</sup>

#### (b) *Compensation Order*

In so far as compensation relates to a period *after* the order, the order will be made against the person who, *at the date of the order*, is the former employer.

In so far as compensation relates to a period *before* the order, the order will be made against the person who, *during the period of default*, was the former employer. Where, at different times

<sup>1</sup> A skilled pattern cutter in the boot industry whose last occupation before his war service was in the chinking room, who, work having fallen off, was continuing to receive, by agreement, a cutter's rate, was entitled, on reinstatement to the pay of a pattern cutter : *Horace Stanley Cubitt v. Balby & Haldinstun, Ltd.* (Case No. 14).

<sup>2</sup> Section 9 (2). See *Vaudrey v. Somerset Catchment Board*, *supra*. "Loss" includes travelling expenses : *Norman Brooks v. Manchester Collieries, Ltd.* (Case No. 10).

<sup>3</sup> Schedule II, para. 1.

<sup>4</sup> *Ib.*, para. 2.

<sup>5</sup> *Ib.*, para. 3.

<sup>6</sup> *Ib.*, para. 4. Where the date specified in the order is after the end of the present emergency, the period of *six months* in proviso (b) of s. 1 (2) will run, not from the end of the present emergency, but from the date so specified.



*different persons* have been the former employer, the sums payable will be apportioned by the order.<sup>1</sup>

#### 4. Appeals

In *three types of cases* an appeal may be brought to the umpire or deputy umpire from a *determination or order* of a reinstatement committee or from a committee's *refusal* to make an order.<sup>2</sup>

Application for *leave to appeal* may be made *orally* to the committee after its decision, or *in writing* sent to a local office *within fourteen days* of the decision or *within such further period* as the chairman may in any particular case for good cause allow.<sup>3</sup> If the committee refuse leave, the applicant may *apply to the umpire for leave to appeal*; the application must be in writing, sent to a local office within fourteen days of the committee's refusal, or such further period as the umpire may in any particular case for good cause allow.<sup>4</sup> Applications for leave to appeal, whether to a reinstatement committee or to the umpire, may be determined *without an oral hearing*.<sup>5</sup> An appeal should be sent to a local office within fourteen days after the committee's decision, or, where leave has been granted, within fourteen days of the date of leave or such further period as the umpire may in any particular case for good cause allow.<sup>6</sup> On appeal, a party may conduct his own case or may be represented as before the committee.<sup>7</sup> The hearing will be in *public*, with the same proviso which applies to hearings before the reinstatement committee.<sup>8</sup> Subject to these regulations the umpire may determine his own procedure.<sup>9</sup>

The *three types of cases* in which appeal may be brought, are :

(a) at the instance of an *employers' organisation* of which the employer<sup>10</sup> was a member on the date of the application to the reinstatement committee ;

(b) at the instance of an *employees' association* of which the applicant was a member at that date ;

(c) at the instance either of the employer or of the applicant—

(i) *without leave* where the decision was *not unanimous* ;

(ii) *with leave* of the committee, the umpire or a deputy umpire.<sup>11</sup>

<sup>1</sup> Schedule II, para. 5.

<sup>2</sup> Section 10 (1), *infra*.

<sup>3</sup> S.R. & O., 1944, No. 880, para. 5 (1), *Form* in Sched., Pt. V. "Good cause" will not be stereotyped, as under Umpire's Decision 788/31.

<sup>4</sup> *Ib.*, para. 5 (2), *Form* in Sched., Pt. VI.

<sup>5</sup> *Ib.*, para. 5 (3).

<sup>6</sup> *Ib.*, para. 5 (4) ; *Forms* in Sched., Pts. VII, VIII.

<sup>7</sup> *Ib.*, para. 5 (5).

<sup>8</sup> Paragraph 5 (6). For the proviso, see para. 4 (6).

<sup>9</sup> Paragraph 5 (7).

<sup>10</sup> Where at different times different persons have been the former employer, the word includes *any person against whom an order was made by the Reinstatement Committee* : s. 10 (1).

<sup>11</sup> Section 10 (1).

The umpire or deputy umpire may, on appeal, make any determination or order that a reinstatement committee might make. He may dismiss the appeal. Where the relevant facts have changed, he must have regard to the *facts existing at the date of the hearing before him*. His decision is final.<sup>1</sup>

The umpire or deputy umpire sits *with two assessors* appointed by the Minister. If the parties consent in writing, the appeal may be heard in the absence of one assessor, or both.<sup>2</sup>

## VII. ENFORCEMENT

Where an *availability order* has been made and employment is not made available on the specified date in accordance with the order, the person against whom the order was made will be liable on summary conviction to a *fine up to £100*. The court may also order him to pay to the person entitled to the employment *a sum specified in the order, as compensation* for loss suffered or likely to be suffered. This sum must not exceed the remuneration which the latter, in the court's opinion, would have been entitled to if the obligation had been met.<sup>3</sup>

(a) No proceedings can be brought for failure to comply with an order until the time allowed for appealing has expired or until the appeal is decided or withdrawn.

(b) Where, at the date of default, the person against whom the order was made is no longer the former employer, it will be a defence that he "took all reasonable steps to secure compliance with the order."<sup>4</sup>

A sum ordered to be paid by a reinstatement committee or by the umpire or deputy umpire may *also* be recovered *summarily as a civil debt*.<sup>5</sup>

No *other proceedings*—save as specified in s. 11—may be brought for failure to discharge an obligation under the Act.<sup>6</sup>

## VIII. PREVENTION OF EVASION

An employer who, *with intent to evade the Act*, terminates the employment of a person to whom the Act is to apply, will be liable, on summary conviction, to a *fine up to £100*. The court may also order him to pay the employee not more than *twenty-six weeks' remuneration* at the rate last payable before his war service.<sup>7</sup>

<sup>1</sup> Section 10 (2). A hearing before the umpire is a rehearing. Any material "change of circumstances" is relevant. N.S. 9/44. (Decision under National Service Acts, 1939-1942.)

<sup>2</sup> Section 10 (3).

<sup>3</sup> Section 11 (1).

<sup>4</sup> Provisos (a) and (b) to s. 11 (1).

<sup>5</sup> Section 11 (2). Proceedings may not be brought, summarily or otherwise, to recover the sum, until the time allowed for appealing has expired, or until an appeal is decided or withdrawn. Any officer authorised by the Minister may institute civil proceedings on behalf of the person to whom the Act applies. This power does not exclude the right of that person himself to sue: s. 11 (4).

<sup>6</sup> Section 11 (3).

<sup>7</sup> Section 14.

## IX. WAIVER

The statutory conditions precedent that an applicant *make and renew an application* to his former employer to be taken back, and that he *notify the date of his availability for employment*, are for the protection of his former employer. They may be *waived or dispensed with by the former employer*, wholly, or in part, expressly or by conduct.<sup>1</sup> Except where the applicant has been taken back by his former employer since the end of his war service, a requirement that anything be done *in writing* cannot be waived or dispensed with except in writing.<sup>2</sup>

Where (a) a person to whom the Act applies, has applied under s. 1, and before his application has expired has been *taken back* by his former employer into employment; or (b) such a person is so taken back (application *waived or dispensed with*), and in *either case*, the employment is not within s. 1 (1), his rights against his former employer will not be less than they would have been if the employment had been within s. 1 (1).<sup>3</sup>

## X. REGULATIONS

The Minister may make regulations (a) on the *procedure* of reinstatement committees and appeals<sup>4</sup>; (b) *prescribing any other thing* which this Act requires or authorises to be prescribed.<sup>5</sup> Regulations are laid before both Houses and may, within forty days of being laid, be annulled by prayer.<sup>6</sup>

## XI. EVIDENCE

The following evidence will be *conclusive* in any proceedings before a reinstatement committee or on appeal:—

A *certificate of the Minister* that a person performed whole-time services under direction or request by the Minister, or as to the *date* on which that person began or ended his services; a *certificate of the competent naval, military or air force authority, or the Minister of Home Security* as to—

(a) the nature, extent and duration of any person's *service* in the armed forces or in any capacity mentioned in the First Schedule, or in a civil defence force; or

<sup>1</sup> Section 15 (1). *Vaudrey v. Somerset Catchment Board, supra.*

<sup>2</sup> Section 15 (1), proviso.

<sup>3</sup> Section 15 (2).

<sup>4</sup> Section 16 (1); under this subsection The Reinstatement in Civil Employment (Procedure) Regulations, 1944 (S.R. & O., 1944, No. 880), have been made.

<sup>5</sup> For example, the Reinstatement in Civil Employment Act, 1944 (Commencement) Order, 1944 (S.R. & O., 1944, No. 879).

<sup>6</sup> Section 16 (2).

(b) the purposes for which a person was *discharged or released* from the armed forces, or from such capacity, or from a civil defence force.<sup>1</sup>

*Every document purporting to be such a certificate and to be signed by or on behalf of the Minister or competent authority, or the Secretary of State, or the Minister of Home Security, shall be received in evidence. Until the contrary is proved, it will be deemed to be such a certificate. The production of such a document purporting to be so certified to be a true copy shall, unless the contrary is proved, be sufficient evidence.*<sup>2</sup>

The production in *any* proceedings (civil or criminal) of a document purporting to be certified by the chairman of a reinstatement committee, or by the umpire or deputy umpire, to be a *true record of a determination or Order* shall, unless the contrary is proved, be sufficient evidence.<sup>3</sup>

<sup>1</sup> Section 17 (1).

<sup>2</sup> Section 17 (2).

<sup>3</sup> Section 17 (3).

## PART III

### FRUSTRATION OF CONTRACT

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### CHAPTER XV

#### CANCELLATION AND SUSPENSION

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#### A. CANCELLATION CLAUSES

**THE** power to cancel a contract depends upon the terms of the contract. *Frustration of a contract is an implication of law, irrespective of the intention of the parties.*<sup>1</sup>

<sup>1</sup> See *per* Lord Sumner in *The Hirji Mulji Case* [1926] A.C. 497, 509, 510; *infra*.

### 1. *Peace not Implied Condition*

As a general rule,<sup>1</sup> the mere continuance of peace is not an implied condition of a contract.<sup>2</sup>

"There is no general implication that contracts are at an end if any war affects their performance."<sup>3</sup>

The parties to a contract may provide that upon the outbreak of war, or upon the occurrence of certain specified events or effects of war, either party may cancel the contract.<sup>4</sup>

### 2. *Cancellation and Frustration*

Notwithstanding a cancellation clause, if it is clear that although a contingency has been provided for, it has been provided for only for the purpose of dealing with one of its effects and not with all, the court may hold that the contract is dissolved by law, if, without the fault of either party, its commercial object has been frustrated.<sup>5</sup>

### 3. *Cancellation Clause in Charterparty*

Where the charterers and owners may cancel the contract upon "war" involving the country of the charterers, the word "war" must be construed in a common-sense way; "war" may exist without a declaration of war, and includes military operations or armed conflict undertaken or occurring *animo belligerendi*. the *Kawasaki Case*.<sup>6</sup>

#### 1. *"Interference" by War*

A contract may provide that should circumstances arise which may interfere with the supply or shipment or carriage or delivery of the goods, the contract may be cancelled.<sup>7</sup>

A coaling contract containing the above clause was made in December, 1914, between steamship owners and a coaling company, whereby the owners agreed to take from the company

<sup>1</sup> For an exceptional case, see *In re Radische Co., Ltd.* [1921] 2 Ch. 331

<sup>2</sup> *Per* McCardie, J., in *The Blackburn Bobbin Case* [1918] 1 K.B. 540, 549. See also, *per* Rowlatt, J., in *Associated Portland Cement Manufacturers* (1900), *Ltd. v. William Cory & Son, Ltd.* (1915), 31 T.L.R. 442, 443.

<sup>3</sup> *Per* Scrutton, L.J., in *The Comptoir Case* [1920] 1 K.B. 868, 902.

<sup>4</sup> See the observations of McCardie, J., in the *Blackburn Bobbin Case* [1918] 1 K.B. 540, 551, 552. See Campbell, 134-153.

<sup>5</sup> See *per* Lord Sumner in *The Bank Line Case* [1919] A.C. 435, 456, 457. See also the *Souter Case* [1917] 1 K.B. 222, 236, 246, *per* Swinfen Eady, Bankes, L.J.J.; the *Metropolitan Water Board Case* [1917] 2 K.B. 1, at 24, *per* Warrington, L.J.; the *Cricklewood Case* (1945), 61 T.L.R. 202, 207, *per* Lord Porter.

<sup>6</sup> *Kawasaki Kisen Kaisha, Ltd. v. Baniham Steamship Co., Ltd.* (No. 2) [1939] 2 K.B. 544; affirming (1938), 61 Ll. L. Rep. 131, *supra*, 18, 19.

Compare *Court Lane, Ltd. v. Dani & Russell, Incorporated* (1939), 44 Com. Cas. 345, 352, *per* Branson, J.

<sup>7</sup> *Scheepvaart Maatschappij Gylsen v. North African Coaling Co.* (1916), 114 L.T. 755, 757, 758.

all the bunker coal they wanted at Algiers, and the company agreed to supply all the coal the owners normally needed at that port. In February, 1915, the company, having been deprived, by requisition, of the ship that was ready, cancelled the contract, and refused to supply one of the owners' ships with coal at Algiers; the owners incurred £600 additional expense in obtaining it elsewhere. Freight had risen; the company would have had difficulty in chartering a vessel at more than double the contractual freight.

The requisition of the ship and the shortage of ships were fresh "circumstances" *interfering with* the supply of coal, which entitled the suppliers to cancel.<sup>1</sup>

#### 5. "Prevention" of Shipment by Hostilities

A contract may provide that in case of *prohibition* of export, or blockade or hostilities *preventing shipment* of a particular description of goods to this country, the sellers may cancel the whole or any unfulfilled part of the contract.<sup>2</sup>

(a) *Bakers sued for damages for breach of contract to deliver flour.* The contract, made in July, 1914, contained the above clause. At the end of July, export of wheat and flour was *prohibited* by numerous countries, and on the outbreak of the war, importation from enemy countries was prohibited. Between 27th July and 12th August, the price of wheat rose considerably; that was a *prevention*. Moreover, *export from Russia was prohibited*. The millers were entitled to cancel.

(b) By a c.i.f. contract made in January, 1917, the buyers bought *Japanese beans to be shipped from Japanese ports, in February or March, 1917*. The contract could be cancelled "should shipping be prevented . . . by hostilities." The sellers failed to ship in February or March, but they shipped part in April. *No hostile operations existed in Japanese waters early in 1917, although there was a serious shortage of tonnage.* The buyers refused to accept and prices having risen, claimed damages. In May, the Food Controller made an order cancelling all contracts for the sale of beans. The arbitrators found the shipment was not prevented by hostilities. McCardie, J., held that the *sellers were not relieved from performance*.<sup>3</sup>

"There must be a definite physical cause, or a definite administrative act, which operates to prevent the fulfilment of the contractual obligation. The fact that the fulfilment of a

<sup>1</sup> For the meaning of "unavoidable hindrance," see *Crawford & Rowat v. Wilson, Sons & Co.* (1896), 1 Com. Cas. 277, 280, *per Brett, M.R.*

<sup>2</sup> *Ford & Sons (Oldham), Ltd. v. Henry Lestham & Sons, Ltd.* (1915), 31 T.L.R. 522, 523.

<sup>3</sup> *Produce Brokers Co. v. Weiss & Co.* (1917), 87 L.J.K.B. 472.

contract will involve a heavy loss to vendors will not amount to prevention."<sup>1</sup>

#### 6. *Force Majeure*

Where a contract provided "Free from non-delivery caused by *force majeure*," although congestion on the railways did not, by itself, come within the clause, an embargo on commercial freight imposed in the United States at the end of 1917, in order to get foodstuffs down to the seaboard, constituted *force majeure*.<sup>2</sup>

#### 7. "*Unforeseen Circumstances*" *Excepted*

Where damages for breach of contract to supply goods were claimed and the defendants said that under the clause "*strikes, breakdowns, or other unforeseen circumstances excepted*," by reason of the Limitation of Supplies Order, 1941, they were excused, the court held that *the clause did not come into operation*.<sup>3</sup> Lord Greene, M.R., held that "the phrase '*unforeseen circumstances*' in its context refers to circumstances making the performance of the contract impossible."<sup>4</sup>

### B. SUSPENSION CLAUSES

*The power to suspend the performance of a contract depends upon the terms of the contract. The doctrine of frustration is an implication of law, irrespective of intention.*<sup>5</sup>

#### 1. *Where one Party becomes Enemy*

Where one party to a trading contract becomes an *alien enemy*, a suspension clause providing that, during the war, the contractual obligations should be *suspended*, is against public policy, and is illegal and void.<sup>6</sup>

<sup>1</sup> *Ib.*, at 476, following *Bailhache, J.*, in *Peter Dixon & Son, Ltd. v. Henderson, Craig & Co., Ltd.* (1917), 23 Com Cas 70, 71, 73.

<sup>2</sup> *Joseph Cowden & Co. v. Commercial Products Co., Ltd.* (1919), 1 Ll. L. Rep. 425, 533; (1920), 2 Ll. L. Rep. 344, 346 (Court of Appeal, reversing a judgment of *Bailhache, J.*)

See also *Bache & Wig v. Montague L. Meyer* and *Bache & Wager v. Montague L. Meyer* (1920), 4 Ll. L. Rep. 225; (1921), 7 Ll. L. Rep. 63 (Court of Appeal reversing a judgment of *Bailhache, J.*), where, the port being closed, the seller was unable to deliver.

<sup>3</sup> *J. Levey & Co., Ltd. v. George H. Hurst & Co., Ltd.* (1943), 2 All E.R. 581.

<sup>4</sup> *Ib.*, at 583, following *Greer, J.*, in *George Wills & Sons, Ltd. v. R. S. Cunningham, Son & Co., Ltd.* [1924] 2 K.B. 220, 221. "It is not enough for the defendants to show that it was impossible for them to get the goods from the particular source they contemplated when entering into the contract. If they could have obtained goods elsewhere which would have satisfied the contract, they were bound to do so."

<sup>5</sup> See note 1, *supra*, 394.

<sup>6</sup> *The Ertel Bieber Case* [1918] A.C. 260, 274, 275, *per Lord Dunedin*; at 288, *per Lord Sumner*, *supra*. See also *Zinc Corporation, Ltd. v. Hirsch* [1916] 1 K.B. 541, 558, *per Swinfen Eady, L.J.*; "The true answer must be that the tie has become, not suspended, but dissolved by the war." Again, in *Distinguition Hematite*



## 2. Suspension Clauses

Subject to the previous paragraph, the parties may provide that upon the outbreak of war, or upon the occurrence of certain specified events or effects of war, the performance of the contract, at the option of either party, may be *suspended*.<sup>1</sup>

## 3. Suspension and Frustration

Notwithstanding a suspension clause, if it is clear that such clause does not refer, nor was intended to refer, to the kind of war which in fact occurred, for example, a war between the country of the contracting parties and the country of the source of supply, the court may hold that the clause, in the event, does not apply; the contract is dissolved by law if, without the fault of either party, its commercial object has been frustrated.<sup>2</sup>

## 4. "Hindrances" affecting Delivery

A contract may provide that in the event of war, or other *hindrances intervening or interfering or affecting delivery*, the sellers may, either entirely or in part, *suspend deliveries*.<sup>3</sup>

The defendants agreed to deliver to the plaintiffs 1,500 tons monthly, of "D.C.B." (that is, Northumberland) coal during the year 1915, at 13s. 3d. per ton. From April to December they failed to deliver; the plaintiffs, having bought against them at very high prices, claimed differences amounting to £3,395. The defendants contended that under the above clause, they were entitled to suspend delivery. An abnormal rise in price, of 88 per cent., from 13s. 3d. to 25s., had occurred, due to the war; the output of the Northumberland collieries was reduced; some collieries would not contract ahead, and none except on very hard terms. Coal could have been obtained if

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*Iron Co., Ltd. v. Possehl & Co.* [1916] 1 K.B. 811, 814, per Rowlatt, J.: "The war having interfered with the performance of this contract, the contract is dissolved." And see the *Naylor, Benzon Case* [1918] 1 K.B. 331, 337, per McCordie, J.; and the *Badische Case* [1921] 2 Ch. 331, 378, per Russell, J., *infra*.

<sup>1</sup> For the various meanings of the word "suspend," see the judgment of McCordie, J., in the *Naylor, Benzon Case*, *supra*, at 338. It may mean (1) that "the whole contractual obligations" are suspended; or (2) that *deliveries only* are postponed, other obligations remaining unimpaired; or (3) that *deliveries* are cancelled, other obligations remaining unimpaired.

<sup>2</sup> See per Russell, J., in *In re Badische Co., Ltd.* [1921] 2 Ch. 331, 381, *infra*. See also per Warrington, L.J., in *Metropolitan Water Board v. Dick, Kerr & Co.* [1917] 2 K.B. 1, 24, *infra*. See also *Pacific Phosphate Co., Ltd. v. Empire Transport Co., Ltd.* (1920), 4 Ll. L. Rep. 189, where the suspension clause did not make full provision in the event of war and the contract became frustrated.

Compare *Baxter, Fell & Co., Ltd. v. Galbraith & Grant, Ltd.* (1941), 70 Ll. L. Rep. 142, 159, 160, where Atkinson, J., held that a contract becoming illegal to perform was not saved from frustration by a "war clause," providing that "anything done or not done by reason of or in compliance with these clauses is within the contract voyage": *infra*, 406, notes 2 and 5.

<sup>3</sup> *S. Instone & Co., Ltd. v. Speeding, Marshall & Co.* (1915), 32 T.L.R. 202, 203.

the defendants had been indifferent as to price. The sellers were not entitled to suspend deliveries.

### 5. *Economic Unprofitableness*

A clause providing that deliveries should be partially or entirely suspended if war should *prevent* the sellers from *shipping or exporting the goods from abroad*, or from *delivering them under normal conditions*, does not entitle the sellers to suspend deliveries because the rise in freights has rendered the carrying out of the contract *economically unprofitable*.

In *Blythe & Co. v. Richards, Turpin & Co.*,<sup>1</sup> merchants and sellers of ore bought by them in Spain and Portugal contracted, in December, 1914, to sell to English manufacturers of sulphuric acid 6,000 tons of iron pyrites in each year 1915, 1916 and 1917. The pyrites were to be obtained from Portugal. In January, 1915, there was a great increase in freights, which rose from 8s. to 15s. a ton. The sellers gave notice that since conditions had become "abnormal," they refused to deliver at the contract price, but were willing to deliver at an increased price.

"I think prevention by the matters referred to," said Scrutton, J., "is physical or legal prevention, not economic unprofitableness. You are not prevented from buying a thing if you think its cost higher than you can afford, or that it is not worth the price. You are prevented from buying a thing by a given cause if, owing to that cause, there are none to be had."

### 6. *War "affecting" the Mine*

Where a contract provided that in the event of war *affecting* the mine or the ships by which the iron ore agreed to be sold was to be conveyed, the contract should, *at the option of the party affected*, be wholly or partially suspended, notice of suspension could be given upon the stoppage of the mine, if the war was *the effective cause*.

In *Ebbw Vale Steel, Iron & Coal Co. v. McLeod & Co.*,<sup>2</sup> by contracts made in March and November, 1914, the defendants agreed to sell to the plaintiffs 15,000 tons of iron ore and 10,000 tons worked at, and conveyed from, a specified Spanish mine. In February, 1915, after 8,000 tons had been delivered under the first contract, the defendants gave notice of suspension; owing to the war and the loss of the German market the mine had closed down. A great shortage of shipping had also occurred, and a consequent rise of freights.

<sup>1</sup> (1916), 114 L.T. 753, 755. Compare *Jacob Baenziger v. Hazan & Co.* (1919), 1 Ll. L. Rep. 51, per Bailhache, J., *infra*, 545; *W. T. Sargant & Sons v. Eric Paterson and Co.* (1923), 15 Ll. L. Rep. 20, 22, per Rowlatt, J., *infra*.

<sup>2</sup> (1915), 31 T.L.R. 604, 605; affirmed (1916), 32 T.L.R. 483 (1917), 33 T.L.R. 208.

Was the stoppage "really due to the war as the effective cause?" said Bailhache, J.

"The war shut up the German market. It shut out by far the largest and most profitable customer of the mineowner and in consequence the mine could not be worked at a profit. This was clearly a case of the war affecting the mine."

#### 7. Rise in Freight not "Prevention"

Where a contract contains a clause enabling sellers to suspend the supply of goods "*in case of war*" or "*any unavoidable stoppage of works*," this means "*in case of war preventing the performance of the contract*"; a mere rise in freight, ships being available and no stoppage of the works having occurred, is not a sufficient excuse for non-delivery.

In *Bolckow, Vaughan & Co., Ltd. v. Compania Minera de Sierra Minera*,<sup>1</sup> the plaintiffs sued the defendants for damages for breach of contract made in November, 1914, for the sale of 50,000 tons of iron ore at 13s. a ton, to be delivered during 1915 at Middlesbrough. The sellers delivered 5,439 tons in December, 1914, and 1,365 tons in February, 1915, but in March they refused, under the above clause, to make any further deliveries until after the war. The sellers were a Spanish company controlled by a Spanish firm who had entered into a freight contract with the Spanish company to carry iron ore during 1915 at 5s. 9d. per ton. Freights rose sharply to 16s. a ton; delays occurred to shipping; the Spanish firm could not carry out their freight engagements with the Spanish company. In February, 1915, the German threat to sink British and neutral shipping was published, with an intimation that neutral ships might unavoidably suffer.

"A seller cannot choose to take the risks of the market and then, when the market has gone against him, claim protection. In such a case he is prevented not by war but his own imprudence."<sup>2</sup>

#### 8. Shortage of Supply "hindering" Delivery

Where a contract provides that delivery may be suspended in the event of war causing a short supply of raw material or manufactured produce, or otherwise preventing or hindering the manufacture or delivery of the article, a suspension is justified where the sellers are prevented, by shortage in supply which hinders delivery, from fulfilling their obligations to their customers generally, in the ordinary course of their business.

In *Tennants (Lancashire), Ltd. v. C. S. Wilson & Co., Ltd.*,<sup>3</sup> the buyers sued the sellers for damages for breach of contract to supply them, under a contract made in 1913, with their 1914

<sup>1</sup> (1916), 32 T.L.R. 404; affirmed (1916), 33 T.L.R. 111.

<sup>2</sup> (1916), 32 T.L.R., at 405.

<sup>3</sup> [1917] A.C. 495.

requirements of magnesium chloride at 63s. per ton. When 240 tons were undelivered, war with Germany broke out; supplies from Germany—the principal source—ceased; there was a substantial shortage and within a few days prices rose by 10s. a ton. The sellers, who had *running contracts with sixteen other buyers*, gave notice under the above clause *suspending* delivery; all the buyers (except the plaintiffs) accepted the suspension. Between August and December, 1914, the sellers were able at an increased price to obtain enough magnesium chloride to perform the plaintiffs' contract, but not enough to satisfy all their contracts and the normal requirements of their business. The suspension was justified, though a mere rise in price was not a "*hindrance*" to delivery.<sup>1</sup>

A short supply of raw material—the majority of the Court of Appeal had held—which did not prevent or hinder manufacture or delivery would not excuse the sellers. *Prevention* meant physical or legal prevention and not economic unprofitableness. "*Hindering*" meant interference of a less degree; economic unprofitableness did not "*hinder*" manufacture or delivery.<sup>2</sup>

In the House of Lords Earl Loreburn said:—

"By short supply is meant, I think, that the quantity available to the seller was substantially less than his requirements. By '*hindering delivery*' is meant interposing obstacles which it would be really difficult to overcome. I do not consider that even a great rise in price hinders delivery . . ."<sup>3</sup>

The sellers could have satisfied the present contract at the cost of disregarding other contracts; this "*hindered*" delivery.

Viscount Haldane declared that the sellers could not have lawfully delivered to the present buyers without also delivering proportionately to their other buyers.

"They were either bound to all their customers equally or they were not bound to any of them."<sup>4</sup>

And Lord Dunedin pointed out that—

"A supply sufficient only for the merchants' needs for his usual customers hinders him in delivery of the full amount to one customer."<sup>5</sup>

According to Lord Atkinson, "*preventing*" delivery means rendering delivery impossible; "*hindering*" delivery means something less, viz., rendering delivery more or less difficult, but not impossible."<sup>6</sup> The "*delivery*" which might be

<sup>1</sup> So held, by a majority of seven law lords, Lord Finlay, L.C., dissenting; reversing the order of the Court of Appeal, *sub nom. Wilson & Co., Ltd. v. Tennants (Lancashire), Ltd.* [1917] 1 K.B. 208 (Lord Cozens-Hardy, M.R., Pickford, L.J., Neville, J., dissenting). See the judgment of Neville, J., at 220.

<sup>2</sup> *Per* Pickford, L.J., in [1917] 1 K.B., at 218.

<sup>3</sup> [1917] A.C., at 510.

<sup>4</sup> *Ib.*, at 511, 512.

<sup>5</sup> *Ib.*, at 515.

<sup>6</sup> *Ib.*, at 518.

prevented or hindered was not, he thought, the mere delivery to one purchaser amongst many, but—

“*delivery* under the normal engagements of the appellants’ trade to the whole body of the customers to whom they were bound to deliver in the year 1914.”<sup>1</sup>

Finally, Lord Wrenbury observed :—

“A merchant has a short supply notwithstanding that he is able to satisfy one customer when he is not able to satisfy all.”<sup>2</sup>

Rise in price was irrelevant, except as evidence with other facts, of short supply.<sup>3</sup>

*Note.*—Upon a *force majeure* clause, see *W. T. Sargent & Sons v. Eric Paterson and Co.* (1923), 15 Ll. L. Rep. 20, 22, *per* Rowlatt, J., *infra*, 548, note 4; *John Batt & Co. (London), Ltd. v. Brooker, Dori & Co., Ltd.* (1942), 72 Ll. L. Rep. 149.

<sup>1</sup> *Ib.*, at 520. Thus, also, Lord Shaw, at 522.

<sup>2</sup> *Ib.*, at 526. Lord Finlay, L.C., who dissented, thought that since arrangements had already been made with the other contractors, the only effective contract was the present contract. If the other contractors had insisted on delivery, deliveries should have been made in order of priority as they fell due; as regards any undelivered balance, there would have been a “prevention.”

<sup>3</sup> This decision was followed by Bailhache, J., in *Peter Dixon & Son, Ltd. v. Henderson, Craig & Co., Ltd.* (1917), 23 Com. Cas. 70, 73. Freights having risen, the buyers refused to pay the additional freight and the sellers accordingly refused to deliver on the ground that war had “prevented” or “hindered” delivery. It was not shortage of tonnage but commercial unprofitableness which determined the sellers to refuse delivery, and they were liable in damages.

## CHAPTER XVI

### DOCTRINE OF FRUSTRATION

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1. *Impossibility Defined*; 2. *Objective and Subjective*; 3. *Existing Impossibility*; 4. *Supervening Impossibility*; 5. *Non-existence or Injury of Specific Thing or Person*; 6. *Non-existence of Essential Facts*; 7. *Temporary Impossibility*; 8. *Partial Impossibility*; 9. *Impossibility of Performing some but not all Bargains*; 10. *Apprehension of Impossibility*; 11. *Frustration of Object or Effect of the Contract*

## A. SOME JUDICIAL DICTA

### 1. *Viscount Simon's Definition*

WHERE the parties by their contract have made full provision for the state of affairs which has arisen, they are bound by their provision. Failing such provision, the rule of frustration applies.

Where the further prosecution of the "mutually contemplated" adventure has been frustrated, the court, upon the facts as found, will hold that it was the "*presumed common intention of the parties*" that in the new state of affairs which has arisen and from the date of that serious "*revolution of circumstance*," the contract is *automatically and completely dissolved by law*, and that *both parties are discharged from all further contractual obligations*. Rights already acquired by either party under the contract remain, and may be vindicated.<sup>1</sup>

Recent usage speaks of the contract as frustrated: the term, though inaccurate, is convenient and has been sanctified by the Legislature in the *Law Reform (Frustrated Contracts) Act, 1943*.

To reconcile all the judgments and the speeches is difficult<sup>2</sup> and no such attempt will be made. The judicial dicta cited below are those that appear to embody the true basis of the rule.

In the latest of the great tetralogy of recent decisions on Frustration,<sup>3</sup> Viscount Simon, L.C.—*quorum pars magna fuit*—has given, for the first time, a comprehensive and authoritative definition:—

<sup>1</sup> This statement is based upon the analysis by Lord Sumner in the *Bank Line Case* [1919] A.C. 435, 455-460, and in the *Hirji Mulji Case* [1926] A.C. 497, 505-510; and by McCardie, J., in the *Larrinaga Case* (1922), 27 Com. Cas. 160, 174-178. "Partial dissolution is not a legal doctrine," said McCardie, J.: (1922), 27 Com. Cas., at 178. "The contract is dissolved *in toto* or not at all." And in *Dominion Coal Co. v. Maskinonge Steamship Co.* [1922] 2 K.B. 132, 137: "... there is no such thing as 'partial frustration'... A contract either exists or it does not exist." See also *Denny Mott Case* [1943] S.C. 293, 314, *per* Lord Justice-Clerk (Cooper).

<sup>2</sup> See *per* Goddard, J., in *Tatem, Ltd. v. Gamboa* [1939] 1 K.B. 132, 136.

<sup>3</sup> *The Constantine Case* [1942] A.C. 154, *infra*, 525; *The Fibrosa Case* [1943] A.C. 32, *infra*, 627; *The Denny Mott Case* [1944] A.C. 265, *infra*, 518; *The Orickewood Case* (1945), 61 T.L.R. 202, 203, *infra*, 568.

"Frustration may be defined as the premature determination of an agreement between parties, lawfully entered into and in course of operation at the time of its premature determination, owing to the occurrence of an intervening event or change of circumstances so fundamental as to be regarded by the law both as striking at the root of the agreement, and as entirely beyond what was contemplated by the parties when they entered into the agreement. If, therefore, the intervening circumstance is one which the law would not regard as so fundamental as to destroy the basis of the agreement, there is no frustration. Equally, if the terms of the agreement show that the parties contemplated the possibility of such an intervening circumstance arising, frustration does not occur. Neither, of course, does it arise where one of the parties has deliberately brought about the supervening event by his own choice<sup>1</sup> . . . But where it does arise, it operates to bring the agreement to an end as regards both parties forthwith and quite apart from their volition."

A magnificent definition—if one may say so with great respect ; in it are integrated those aspects of the principle which the cases have illumined. "The implied term" of legal fiction—and of Viscount Simon's previous dicta—has gone : frustration is *an event*, a "premature determination of an agreement" by an event or by circumstances that *the law regards* as striking at the root of the agreement. This definition may render obsolete some judicial dicta cited below and hitherto regarded as definitive.

## 2. "Presumed Common Intention of the Parties"

"The theory of dissolution of a contract by the frustration of its commercial object rests on an implication, which arises from the presumed common intention of the parties."

The "*presumed common intention*" : this is Lord Sumner's phrase in the *Bank Line Case*.<sup>2</sup> The court, holding *on the facts of a given case*, that "the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist,"<sup>3</sup> will read into the contract a *constructive term* (provided always that the contract contains no clause inconsistent with such condition), which "the parties would have inserted had the matter occurred to them, on the basis of what is fair and reasonable, having regard to the mutual interests concerned and of the main objects of the contract."<sup>4</sup>

<sup>1</sup> *The Constantine Case* [1942] A.C. 154, 160, *per* Viscount Simon, L.C.

<sup>2</sup> *Bank Line, Ltd. v. Arthur Capel & Co.* [1919] A.C. 436, 455.

<sup>3</sup> *Per* Earl Loreburn in the *Tamplin Case* [1916] 2 A.C. 397, 403.

<sup>4</sup> *Per* Lord Sumner in *The Hirji Mulji Case* [1926] A.C. 497, 510.



Says Lord Wright in *The Constantine Case*,<sup>1</sup>

"the court has to decide, not what the parties actually intended, but what as reasonable men they should have intended. The court personifies for this purpose the reasonable man."

### 3. "Device" of Implied Condition ; Lord Sumner

The theory of an *implied condition*, viz., of a "presumed common intention" that, upon the frustration of the *common object* of a contract the contract shall be dissolved, rests upon a *device* evolved by the courts (more particularly during the war of 1914), in order to supply a uniform juristic basis for a dissolution which appears just and necessary.

The legal effect of frustration, Lord Sumner boldly declared, "does not depend on their [sc. 'the parties'] intention or their opinions, or even knowledge, as to the event, which has brought this about, but on its occurrence in such circumstances as show it to be inconsistent with further prosecution of the adventure . . . Frustration . . . operates automatically . . . What the parties say and do is only evidence, and not necessarily weighty evidence, of the view to be taken of the event by informed and experienced minds."<sup>2</sup>

This reasoning shows that the "implied condition is not based upon the intention of the parties, and *does not exist in fact, but only in the eye of the law*—or, rather, in the trained mind of the judge trying the case (or of the appellate tribunal), formed upon principles laid down in a long line of similar cases."<sup>3</sup>

Frustration, continued "that great master of the law,"<sup>4</sup>—in memorable words that once for all summarise the reason of the rule—Frustration

"is irrespective of the individuals concerned, their temperaments and failings, their interest and circumstances. *It is really a device, by which the rules as to absolute contracts are reconciled with a special exception which justice demands.*"<sup>5</sup>

<sup>1</sup> *The Constantine Case* [1942] A.C. 154, 185, *infra*, Chap. XIX, 525 *et seq.*

<sup>2</sup> [1926] A.C., at 509, *sc.* the court. See also, *per* Lord Wright, in the *Constantine Case* [1942] A.C., at 187, and in *The Denny Mott Case* [1944] A.C. 265, 275. "It is the automatic presumption from the facts as they really were and the probabilities as they really were. It does not rest upon what the parties knew or thought or believed. One party might take one view and the other the other. It is something which operates automatically by virtue of law as soon as the facts or probabilities or relevant circumstances become sufficient to frustrate the contract. Then, whether the parties know it or not, the object of the contract is frustrated, with the consequent result that the contract has automatically come to an end": *per* Atkinson, J., in *Baxter, Fell & Co., Ltd. v. Galbraith & Grant, Ltd.* (1941), 70 Ll. L. Rep. 142, 157, *supra*, 398, note 2; *infra*, 407, note 5.

<sup>3</sup> See Wright, *Legal Essays and Addresses*, 385.

<sup>4</sup> *Per* Viscount Simon, L.C., in *Heyman v. Darwins, Ltd.* [1942] A.C. 356, 366.

<sup>5</sup> [1926] A.C., at 510; author's italics. Frustration is a question of law for the court, upon the facts as found; see *per* Bankes and Scrutton, L.JJ., in the *Comptoir*.

#### 4. Lord Wright's Analysis of the "Fiction"

Lord Wright<sup>1</sup>—continuing and perfecting the tradition of Lord Sumner—analyses this fiction with clear and ruthless logic:—

"There is a contract: something has happened under it which the parties have not provided for because they did not anticipate it; it is unjust that the parties should continue bound. The court disowns the possession of any absolving power and proceeds on the fiction that the parties must be presumed to have had the intention that if such things happened the contract should be avoided. That is a fiction, because the parties in fact had no intention, because they had no foresight, about it . . . It is merely because they did not and could not reasonably anticipate what happened, that the court will declare the contract to be dissolved—that is, automatically ended without the option of either party. Neither party is any longer bound. It is not that one party is excused from performance as from the relevant date: both parties are equally released from the contractual nexus."<sup>2</sup>

Lord Wright explains the origin of the idea in "contracts for hire, use or purchase of *chattels*, which *perish without the fault* or election of either party"<sup>3</sup>; the extension of the doctrine—illegitimate, he thinks—to the "*Coronation Seat Cases*"<sup>4</sup>; and

*Case* [1920] 1 K.B. 868, 886, 889; *per* Atkinson, J., in *Baxter, Fell & Co., Ltd. v. Galbraith & Grant, Ltd.* (1941), 70 Ll. L. Rep. 142, 148; *per* Lord Wright in *The Denny Mott Case* [1944] A.C. 265, 276: "The event is something which happens in the world of fact, and has to be found as a fact by the judge. Its effect on the contract depends on the meaning of the contract, which is matter of law." This "pithy description" by Lord Sumner is quoted with approval by Lord Wright in *The Denny Mott Case*, *supra*, and in *The Cricklewood Case* (1945), 61 T.L.R. 202, 206, *infra*, 577.

<sup>1</sup> *Legal Essays and Addresses*, 255–259. See *Preface*, ix, x, for the contrast between the judgment and the extra-judicial essay.

See also, analysis in *The Denny Mott Case* [1944] A.C. 265, 275, *infra*.

<sup>2</sup> *Id.*, 255. See Sturge, *The Doctrine of Implied Condition* (1925), 41 L.Q.R. 170–175. "Implied condition," says the learned writer (at 171), "may mean one of three things: either (1) that the parties contemplated the event and tacitly agreed that in such case the contract should come to an end, or (2) that, though they did not actually contemplate the event, they would both, if they had thought about the matter, have agreed that it should have that effect, or (3) that, whatever the parties may have really thought, the law imputes such an intention to them as reasonable men." In the *Comptoir Case* [1920] 1 K.B. 868, 899, 900, Scrutton, L.J., adopted the first alternative; in the *Tamplin Case* [1916] 2 A.C. 397, 404, Earl Loreburn adopted the second; while in the *Bank Line Case* [1919] A.C. 435, 455, 459, Lord Sumner adopted the third alternative—put with greater clarity in the *Hirji Mulji Case* [1926] A.C. 497, 509.

<sup>3</sup> For example, *Howell v. Coupland* (1876), 1 Q.B.D. 258, 261: "It was not an absolute contract of delivery under all circumstances, but a contract to deliver so many potatoes, of a particular kind, grown on a specific place, of deliveries from that place": *per* Lord Coleridge, C.J. (Author's italics.)

<sup>4</sup> For example, *Krell v. Henry* [1903] 2 K.B. 740, 748, 749, *per* Vaughan Williams, L.J. And see Lord Wright's observation in *Maritime National Fish, Ltd. v. Ocean Transporters, Ltd.* [1935] A.C. 524, 528, 529.

finally, the "*Requisition Cases*," where a chartered ship had been validly requisitioned by the Government: "thus the ship was, *quoad* that contract, in the same position as if it had been destroyed.<sup>1</sup> The principle is the same as if the ship had been lost or rendered unavailable for an indefinite period by a sea casualty."<sup>2</sup> The rule was legitimately applied where *constructional work was indefinitely interrupted* by an "unforeseen and unavoidable contingency" which changed "the character of the obligation."<sup>3</sup>

"In all these cases neither party can give or receive *modo et forma* what the contract as between the parties requires."<sup>4</sup>

### 5. "Supplementing Power" of the Court

The court *disowns* a "dissolving power," Lord Wright continues; no court—Lord Loreburn had observed—has an "absolving power" or can vary the contract.<sup>5</sup> Hence the doctrine arose of the implied term.

"It would be truer to say," continues Lord Wright, "that *the court in the absence of express intention of the parties determines what is just.*"<sup>6</sup>

Similarly, where, on a sale of goods, no price is specified, the court implies a reasonable price. What is reasonable is a question of fact "to be ascertained in each case by a consideration of all the relevant circumstances of the case." But what is "reasonable"? To say that it is what a reasonable man would pay is "only proceeding on the basis of *idem per idem*." Lord Wright—brushing all fictions aside—boldly declares:—

"The truth is that the court, or jury, as a judge of fact, decides this question in accordance with what seems to be

<sup>1</sup> *The Bank Line Case* [1919] A.C. 435, 460.

<sup>2</sup> *Jackson's Case* (1873), L.R. 8 C.P. 572; (1875), L.R. 10 C.P. 125.

<sup>3</sup> *Metropolitan Water Board v. Dick, Kerr & Co.* [1917] 2 K.B. 1; [1918] A.C. 119.

<sup>4</sup> *Legal Essays and Addresses*, 257.

<sup>5</sup> *Tamplin's Case* [1916] 2 A.C. 397, 403, 404. "Supplementing power" is Lord Wright's term, *op. cit.*, 259. "The doctrine is invented by the court in order to supplement the defects of the actual contract": *The Denny Mott Case* [1944] A.C. 265, 276, *per* Lord Wright. (Author's italics.)

<sup>6</sup> *Legal Essays and Addresses*, 258; author's italics. The explanation of the doctrine is not of no importance or a mere matter of words. "In what terms is the implied term to be deemed to be expressed?" asked Atkinson, J., in *The Constantine Case* [1940] 1 K.B. 812, 826, 827, 839: "I am not going to frame the term which is to be deemed to be implied." Viscount Simon, L.C., succeeds in framing a simple implied term: [1942] A.C. 154, 164.

MacKinnon, L.J., explains the rule that an award may be set aside for error of law on the face of it as based upon "an implied term" that the arbitrator should decide the dispute by the proper application of the law: *Racecourse Betting Control Board v. Secretary for Air* [1944] Ch. 114, 125. Is not this, a term imposed by the court?

just and reasonable in its eyes. The judge finds in himself the criterion of what is reasonable. *The court is in this sense making a contract for the parties—though it is almost blasphemy to say so.* But the power of the court to do this is most beneficial, and, indeed, even essential.”<sup>1</sup>

<sup>1</sup> *Legal Essays and Addresses*, 259; author's italics. The following passage (cited by counsel in *Lumsden v. Barton & Co.* (1902), 19 T.L.R. 53—a “Coronation Case”) from Pollock's article on *Contract*, *Encyclopædia Britannica*, 10th ed., vol. 27, p. 220 (author's italics), is highly significant:—

“The business of the law, therefore, is to give effect, so far as possible, to the intention of the parties, and all the rules for interpreting contracts go back to this fundamental principle and are controlled by it . . . The guiding principle still is, or ought to be, the consideration of what either party has given the other reasonable cause to expect of him . . . The court may look to the analogy of what the parties have expressly provided for other specified events; to the constant or general usage of persons engaged in like business; and, as held, ultimately to the court's own sense of what is just and expedient” (author's italics). (Repeated in 11th ed., vol. 7, p. 38; 14th ed., vol. 6, p. 342 (1929).) In the 14th ed., Pollock added the following lucid analysis of the doctrine of frustration: “One important application of this principle is the doctrine of ‘frustration of the adventure,’ now largely developed in cases arising out of the World War. Where the fulfilment of a contract according to the true intention is rendered impossible by emergent facts not within the control or contemplation of the parties, the court will treat the contract as if it had been conditional and hold performance excused” (author's italics). This statement disposes of the fiction of the “implied condition.” The additional passage continues “. . . the result is that the possibility of liberal [literal?] performance has ceased to be an adequate test, and various detailed rules and exceptions are now brought under a more general concept.” Then follows the original text: “All auxiliary rules of this kind are subject to the actual will of the parties, and are applied only for want of sufficient declaration of it by the parties themselves. A rule which can take effect against the judicially known will of the parties is not a rule of construction or interpretation, but a positive rule of law . . . In modern times the courts have avoided laying down new rules of construction, preferring to keep a free hand and deal with each case on its merits as a whole.”

Upon the function of the court to do justice, see the stimulating address by Sir Wilfrid Greene, M.R., to the Holdsworth Club (1938), on *The Judicial Office*.

Of the “supplementing power” of the court, two illuminating examples may be given. In *Hillas & Co. v. Arcos, Ltd.* (1932), 38 Com. Cas. 23, the House of Lords, by “the legal implication in contracts of what is reasonable, which runs throughout the whole of modern English law in relation to business contracts,” perfected an indefinite option into a valid contract. (See the speech of Lord Wright at 43, 44.) And in *Donoghue v. Stevenson* [1932] A.C. 562, the House of Lords established the legal duty of care owed under certain circumstances by the manufacturer to the ultimate consumer. See (1933), 49 L.Q.R. 22.

The evolution of the doctrine of frustration is an example of “judicial valour.” “The court has to look to an ideal standard,” wrote that great jurist, “which cannot be precisely defined, but is none other than that general consent of right-minded and rightly informed men which our ancestors in the profession called Reason, and Continental doctors the Law of Nature. . . . Translating this into modern terms, we may say that the duty of the court is to keep the rules of law in harmony with the enlightened common sense of the nation”: *Judicial Caution and Valour*, Sir Frederick Pollock (1929), 45 L.Q.R. 293–306, at 295. And see *Legal Essays and Addresses*, 340, 365, 366. “A modern court should realise what is its ideal, that of doing justice according to the actual facts, though on the lines of established law” (at 385).

See *United Australia, Ltd. v. Barclays Bank, Ltd.* [1941] A.C. 1 [“Waiver of Tort”], 22, 29, 54, per Viscount Simon, L.C., and Lords Atkin and Porter.

“The truth is, that the law is always approaching, and never reaching,

6. "*The True Meaning of the Contract*"; Lord Wright

(a) In *The Constantine Case*,<sup>1</sup> Lord Wright restates—with a somewhat different and, perhaps, more conservative conclusion—the view that he had extra-judicially expounded.<sup>2</sup>

"Frustration," or "frustration of the contract" is "elliptical": the more accurate phrase is:

"frustration of the adventure or of the commercial or practical purpose of the contract."<sup>3</sup>

"Frustration of the contract" was used in *The Fibrosa Case*.<sup>4</sup>

The effects of frustration occurring on or after 1st July, 1943, are determined by the *Law Reform (Frustrated Contracts) Act, 1943*. This term, thus given judicial and statutory sanction, now prevails over the more accurate phrase. With this term Lord Wright begins his speech in *The Denny Mott Case*.<sup>5</sup>

The change in language corresponds to a "wider conception of impossibility" *extending the rule* beyond contracts depending on the existence, at a relevant time, of a specific object, to cases where the object does exist, but "*its condition has by some casualty been so changed*" as to be not available for the purposes of the contract either at the contract date, or, if no date is fixed, within any time consistent with the commercial or practical adventure. *For the purposes of the contract the object is as good as lost*.<sup>6</sup> Another case is where "*by State interference or similar overriding intervention*" performance has been interrupted for so long as to make resumption unreasonable. Again: the actual object exists and is available, but "*the object of the contract as contemplated by both parties*" was its employment for a particular purpose" which—as in the Coronation cases—has become impossible.<sup>7</sup> "Impossibility" in a strict sense, there is not; but "so vital a change in the circumstances" has "defeated" the contract.

"What Willes, J., described as substantial performance is no longer possible. The common object of the parties is frustrated. The contract has perished, *quoad* any rights or liabilities subsequent to the change."<sup>8</sup>

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consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow": Holmes, *The Common Law* (1881), 36.

<sup>1</sup> [1942] A.C. 154, 182–187.

<sup>2</sup> *Ib.*, 187.

<sup>3</sup> *Ib.*, 182.

<sup>4</sup> [1943] A.C. 32, 50, *per* Viscount Simon, L.C.; at 73, *per* Lord Roche; at 77 *per* Lord Porter.

<sup>5</sup> [1944] A.C. 265, 273.

<sup>6</sup> [1942] A.C., at 183; author's italics.

<sup>7</sup> *Ib.*, 183; author's italics.

<sup>8</sup> *Ib.*, and see at 182, citing *Inchbald v. Western Neilgherry Coffee, etc., Co., Ltd.* (1864), 17 C.B. (N.S.) 733, 741, where Willes, J., cited "the case in *Bulstrode* where the defendant contracted to deliver to the plaintiff a horse, but poisoned him before delivery."

Thus also, where "a vital change of the law" has operated on the circumstances, e.g., where a pre-war contract becomes unlawful upon the outbreak of war, because it involves trading with the enemy. "The range of circumstances" to which "frustration" may extend is "wide and various."

The doctrine, Lord Wright continues, is "intended to achieve a just and reasonable result." After quoting Lord Sumner's words in the *Hirji Case*,<sup>1</sup> Lord Wright observes that "a contract absolute in terms, is not necessarily absolute in effect. It is in all cases a question of construction, as Lord Cranworth, L.C., pointed out in *Couturier v. Hastie*."<sup>2</sup> "The general law as to impossibility or frustration might be stated in positive terms.

It is a question of the construction of the particular contract, whether the obligation is absolute or whether it is qualified."<sup>3</sup> The court does not claim "a dispensing power," or a power "to modify or alter contracts":

"In short, in ascertaining the meaning of the contract and its application to the actual occurrences, the court has to decide, not what the parties actually intended, but what as reasonable men they should have intended. The court personifies for this purpose the reasonable man."<sup>4</sup>

The normally accepted explanation is that the court implies a term or exception and treats that as part of the contract.<sup>5</sup>

"If the question is still open in English law, I should prefer to rest the principle simply on the true meaning of the contract as it appears to the court. The essential feature of the rule is that the court construes the contract, having regard both to its language, its nature and the circumstances, as meaning that it depended for its operation on the existence or occurrence of a particular object or state of things, as its basis or foundation. If that is gone, the life of the contract in law goes with it, at least as regards future performance. The contract remains only to enforce accrued rights."<sup>6</sup>

("What, in fact, was the true meaning of the contract?" said

<sup>1</sup> [1942] A.C., at 184; [1926] A.C. 497, 510.

<sup>2</sup> *Ib.*, 184; (1856), 5 H.L.C. 673, 681. See Sale of Goods Act, 1893, ss. 6, 7.

<sup>3</sup> *Ib.*, 185. See *Glasgow Corporation v. Muir* [1943] A.C. 448, 457.

<sup>4</sup> *Ib.*, 186, referring to Blackburn, J., in *Taylor v. Caldwell* (1863), 3 B. & S. 826; Earl Loreburn in *Tamplin's Case* [1916] 2 A.C. 397, 403; and Lord Sumner in *Bank Line Case* [1919] A.C. 435, and *The Hirji Case* [1926] A.C. 497. See also per Viscount Simon, L.C. [1942] A.C. 163, and in *Heyman v. Darwins, Ltd.* [1942] A.C. 356, 367.

<sup>5</sup> *Ib.*, 187, author's italics. Compare Lord Sumner on "proximate cause," in the *Becker, Gray Case* [1918] A.C. 101, 112: "I believe it to be nothing more nor less than the real meaning of the parties to a contract of insurance." And see Lord Wright's criticism of "implied contract," *Legal Essays and Addresses*, 384, 385. See also *The Denny Mott Case* [1944] A.C. 265, 274-6, *infra*.

Earl Loreburn in *The Tamplin Case*.<sup>1</sup>) The explanation, "implied term" may simply be the judicial way of putting this result, "bringing the rule into line with the general jurisdiction of the court to imply in a contract terms which the parties have not expressed."<sup>2</sup> If the parties go on with the contract, "that is in truth entering into a new contract."<sup>3</sup>

(b) In *The Fibrosa Case*,<sup>4</sup> Lord Wright carries his exposition a stage further; yet, with respect, he appeared to concede what extra-judicially he had consistently criticised.

"When the court holds a contract to be thus terminated, it is simply giving appropriate effect to the circumstances of the case, including the actual contract and its meaning as applied to the event."

The theory of the "implied term"—"implied by the law *ab initio*"—"no one who reads the reported cases can ignore how inveterate is this theory or explanation in English law."<sup>5</sup>

"I do not see any objection to this mode of expression, so long as it is understood that what is implied is what the court thinks the parties ought to have agreed on the basis of what is fair and reasonable, not what as individuals they would or might have agreed . . . The court is thus taken to assume the role of the reasonable man, and decides what the reasonable man would regard as just on the facts of the case. The hypothetical 'reasonable man' is personified by the court itself. It is the court which decides. The position is thus somewhat like the position in the cases in which the court imports a term in a contract on the basis of what is reasonable." With this, the following passage may be compared:—

"The contract has become inapplicable to the facts of the case. Why then call it an implied contract, a fiction which can serve no purpose and can only confuse?"<sup>6</sup>

(c) In *The Denny Mott Case*<sup>7</sup> Lord Wright recognising, perhaps, the apparent inconsistency between his dicta in *Constantine* and *Fibrosa*, expounds, unambiguously now, his realistic analysis.

<sup>1</sup> [1916] 2 A.C. 397, 404. See also *The Leiston Case* [1916] 2 K.B. 428, 432, per Lord Reading, C.J.: "The decision in this case must depend upon the true effect of the contract" (author's italics). (This principle is unaffected by the actual decision in *The Leiston Case*, which has been criticised in *The Denny Mott Case* [1944] A.C. 265, 271, 280, 282, per Viscount Simon, L.C., Lord Wright and Lord Porter.)

<sup>2</sup> See note 5, *supra*, p. 411.

<sup>3</sup> [1942] A.C. 188. And see per Lord Justice-Clerk (Cooper) in *James B. Fraser and Co. v. Denny, Mott & Dickson* [1943] S.C. 293, 316.

<sup>4</sup> [1943] A.C. 32, 70, 71.

<sup>5</sup> See *Heyman v. Darwins, Ltd.* [1942] A.C. 356, 367.

<sup>6</sup> "The Common Law in its Old Home," in *Legal Essays and Addresses*, 384. See also Lord Wright's *Review of Pollock on Contracts*, 11th ed., in 59 L.Q.R. 122-124, at 124, cited *infra*, and Lord Wright's reference to p. 235 in *The Denny Mott Case* [1944] A.C. 265, 273, *infra*, 430, 431.

<sup>7</sup> *Denny, Mott & Dickson, Ltd. v. James B. Fraser & Co., Ltd.* [1944] A.C. 265.

Frustration of contract is not an exception to the duty to perform a contract, or, in default, to pay damages: it is "*a substantive and particular rule which the common law has evolved.*"

What happens is that the contract is held on its true construction not to apply at all from the time when the frustrating circumstances supervene. From that moment there is no longer any obligation as to future performance, though up to that moment obligations which have accrued remain in force."<sup>1</sup>

The application of the principle depends on the facts of each case:

"No detailed absolute rules can be stated. A certain elasticity is essential."<sup>1</sup>

Upon frustration, "a dissolution of a contract occurs automatically:" it depends, not upon the choice or election of a party, but upon "what actually has happened on its effect on the possibility of performing the contract":

"the court decides the issue and decides it *ex post facto* on the actual circumstances of the case."<sup>1</sup>

These circumstances are the construction of the contract and the events which have happened.

"The court has formulated the doctrine by virtue of its inherent jurisdiction, just as it has developed the rules of liability for negligence, or for the restitution or repayment of money when otherwise there would be unjust enrichment."<sup>2</sup>

The basis of the rule was in Lord Sumner's "pregnant statement."<sup>3</sup>

To say that the rule depends on an "implied condition of the contract" is "really no explanation. It only pushes back the problem a single stage. It leaves the question what is the reason for implying a term."<sup>4</sup> The result does not depend on what the parties would or might have agreed.

"The doctrine is invented by the court in order to supplement the defects of the actual contract. The parties did not anticipate fully and completely, if at all, or provide for what actually happened. It is not possible, to my mind, to say that, if they had thought of it, they would have said: 'Well, if that happens, all is over between us.' On the contrary, they would almost certainly on the one side or the other have sought to introduce reservations or qualifications or compensations. As to that the court cannot guess. What it can say is that the contract binds or it does not bind . . . To my mind, the theory of the implied condition is not really consistent with the true theory of frustration. It has never

<sup>1</sup> *Ib.*, at 274 (author's italics).

<sup>2</sup> *Ib.*, at 275 (author's italics).

<sup>3</sup> *Ib.*; *The Hirji Mulji Case* [1926] A.C. 497, 510, *supra*, 406.

<sup>4</sup> [1944] A.C., at 275 (author's italics). See also Atkin, L.J., in *The Russkoe Case* (1922), 10 Ll. L. Rep. 214, 216, 217, *infra*, 416, 417.



been acted on by the court as a ground of decision, but is merely stated as a theoretical explanation."<sup>1</sup>

This view, Lord Wright admits, is "somewhat heretical," but the doctrine has given rise to "many irreconcilable explanations."<sup>2</sup> Viscount Simon, L.C., favours the "implied term."<sup>3</sup> Lord Porter<sup>4</sup> regards as the foundation of the doctrine,

"impossibility of performance by destruction of the subject-matter of the contract, whether that subject-matter be, as it originally was, a person, or later a thing, or later still, the object for which that thing was by the intention of the parties to be used."

In *Denny Mott*,<sup>5</sup> Lord Porter appeared to treat the basis as still open.

It is submitted, with great respect, that the "pregnant statement" of Lord Sumner, perfected by the reasoning of Lord Wright, contains the most convincing explanation of the doctrine of frustration. The time has come to shed the fiction of "implied contract" and to regard the doctrine as *a mode by which, upon the facts of a case, the court itself does justice in circumstances for which the parties never provided*.<sup>6</sup>

#### 7. Disappearance of the "Foundation"; Viscount Haldane

In a case involving the frustration of the commercial object of a charterparty upon seizure of the ship during the Spanish Civil War, Goddard, J., rejected the theory of implied condition,<sup>7</sup> and rested the doctrine upon the principle stated by Viscount Haldane who dissented in the *Tamplin Case*<sup>8</sup> :—

<sup>1</sup> See note 4, *supra*, p. 413.

<sup>2</sup> [1944] A.C., at 276.

<sup>3</sup> *The Constantine Case* [1942] A.C., 154, 163; *The Fibrosa Case* [1942] A.C. 32, 43. But see *Note* (1942), 56 Harv. L. Rev. 307, 308.

<sup>4</sup> In *The Constantine Case* [1942] A.C., at 199. For other views in favour of "the implied term," see *McNair*, 145.

<sup>5</sup> [1944] A.C., at 281.

<sup>6</sup> For the meaning of "unforeseen circumstances," see *The Tatem Case* [1939] 1 K.B. 132, 138, 139, *per* Goddard, J., *infra*, 415.

<sup>7</sup> *Tatem, Ltd. v. Gamboa* [1939] 1 K.B. 132, 137. Branson, J., however, in *Court Line, Ltd. v. Dant & Russell, Inc.* (1939), 44 Com. Cas. 345, 349, 350, accepted the theory of the "implied condition," following the view of Bankes, L.J., in the *Comptoir Case* [1920] 1 K.B. 868, 886.

<sup>8</sup> [1916] 2 A.C. 397, 406, 407. And see Viscount Haldane's dissenting speech in *The Bank Line Case* [1919] A.C. 435, 444, 445: "Whether, in accordance with the modern tendency, the question is treated as one of construction, and an exception is formulated as implied, or whether, as appears to have been the real ground of the judgments in *Baily v. de Crespigny* (1869), L.R. 4 Q.B. 180, *infra*, the question is regarded rather as one of a common mistake . . . does not matter. What is clear is that where people enter into a contract which is dependent for the possibility of its performance on the continued availability of the subject-matter, and that availability comes to an unforeseen end by reason of circumstances over which its owner had no control, the owner is not bound unless it is quite plain that he has contracted to be so." Upon the inadequacy of "common mistake" as an explanation of frustration, see *per* Lord Wright in *The Constantine Case* [1942] A.C. 154, 186.

"When people enter into a contract which is dependent for the possibility of its performance on the continued availability of a specific thing, and that availability comes to an end by reason of circumstances beyond the control of the parties, the contract is *prima facie* regarded as dissolved. The contingency which has arisen is treated, *in the absence of a contrary intention made plain*, as being one about which no bargain at all was made. *The principle applies equally whether performance of the contract has not commenced or has in part taken place.* There may be included in the terms of the contract itself a stipulation *which provides for the merely partial or temporary suspension of certain of its obligations*, should some event . . . so happen as to impede performance. In that case the question arises whether the event which has actually made the specific thing no longer available for performance is such that it can be regarded as being of a nature *sufficiently limited to fall within the suspensory stipulation*, and to admit of the contract being deemed to have provided for it and to have been intended to continue for other purposes. Although the words of the stipulation may be such that the mere letter would describe what has occurred, *the occurrence itself may yet be of a character and extent so sweeping that the foundation of what the parties are deemed to have had in contemplation has disappeared, and the contract itself has vanished with that foundation.*"<sup>1</sup>

If the foundation—not of what the parties *actually had* in contemplation—but of what the law, i.e., the court, *deems* them to have had in contemplation—disappears, then, save for giving effect to rights and wrongs *accrued* on either side, the contract vanishes.<sup>2</sup>

#### 8. Where Contingency Unprovided for ; Lord Goddard

It follows that the doctrine of frustration does not depend upon whether the circumstances are *foreseen* or not. "If the foundation of the contract goes, it goes whether or not the parties have made a provision for it," said Goddard, J. :—

"The parties may make provision about what is to happen in the event of this destruction taking place, but if the true foundation of the doctrine is that once the subject-matter of the contract is destroyed, or the existence of a certain state of facts has come to an end, the contract is at an end, *that result follows whether or not the event causing it was contemplated by the parties.* It seems to me, therefore, that when one uses the expression, '*unforeseen circumstances,*' in relation to the frustration of the performance of a contract one is really

<sup>1</sup> Author's italics.

<sup>2</sup> In the *Larrinaga Case* (1923), 29 Com. Cas. 1, 15, Lord Sumner quoted as the test the last three lines of this passage. See *Hirji Case* [1926] A.C. 497, 500.

dealing with *circumstances which are unprovided for*, circumstances for which (and in the case of a written contract one only has to look at the document) the contract makes no provision."<sup>1</sup>

After quoting from the speech of Viscount Haldane in the *Tamplin Case*,<sup>2</sup> Goddard, J., stated that "unless the contrary intention is made plain, the law imposes this doctrine of frustration in the events which have been described."<sup>3</sup>

"If the *foundation of the contract goes*, either by the destruction of the subject-matter or by reason of such long interruption or delay that the performance is really in effect that of a different contract, *and the parties have not provided what in that event is to happen*, the performance of the contract is to be regarded as frustrated."<sup>4</sup>

In the *Bank Line Case*,<sup>5</sup> the charterparty provided for requisition, namely, that the charterers were to have the option to cancel, and yet the doctrine of frustration applied.

"Although the parties may have had or must be deemed to have had the matter in contemplation, the doctrine of frustration is not prevented from applying."<sup>6</sup>

#### 9. The Fiction Judicially Criticised

(a) *Atkin, L.J.*, explained that the "implied term" was something "imputed by law to both parties."

"It is a little unfortunate that this doctrine of the termination of a contract by reason of frustration should ever have been based upon the theory of an implied contract. There are many positive rules of law imposed upon contracting parties which govern the whole creation, performance and dissolution of a contract which are quite independent of the intention of the parties. For my part I see no reason why, in a certain set of circumstances which the court finds must have been contemplated by both parties as being of the essence of the contract and the continuance of which must have been deemed to have been essential to the performance of the contract, the court should not say that when that set of circumstances ceases to exist, then the contract ceases to operate."<sup>7</sup>

<sup>1</sup> The *Tatem Case* [1939] 1 K.B. 132, 138; author's italics. See note (1938), 54 L.Q.R. 480-482.

<sup>2</sup> [1916] 2 A.C. 397, 406, 407; *supra*, 415.

<sup>3</sup> [1939] 1 K.B. 139.

See also the speech of Viscount Simon, L.C., in *The Constantine Case* [1942] A.C. 154, 163: "There can be no discharge by supervening impossibility if the express terms of the contract bind the parties to performance notwithstanding that the supervening event may occur."

<sup>4</sup> [1919] A.C. 435; *infra*, 495-499.

<sup>5</sup> [1939] 1 K.B. 140.

<sup>6</sup> *Russkoe, etc. v. John Stirk & Sons, Ltd.* (1922), 10 Ll. L. Rep. 214, 216, 217.

The theory of an implied contract has this further disadvantage : it adds one more to legal fictions, of which the fewer there are "the better is the law likely to be upheld."<sup>1</sup> Moreover—

"It is not, as Lord Sumner said, what two hard-headed bargainers subjectively agree with : it is to be regarded objectively as the term which the law imputes to two persons as being a term of the contract resulting in its dissolution."<sup>2</sup>

(b) *Lord Sands*, in the Court of Session,<sup>3</sup> observing that the House of Lords have carefully disclaimed the idea of release from contract otherwise than under an express or implied condition, said :—

"Mr. Chree argued that this is a pious fiction—a fiction because it does not correspond with anything that was in the minds of the parties at the time ; pious because it seeks to do homage to a very sacred legal principle, the sanctity of contract. I confess I have some sympathy with Mr. Chree. It does seem to me somewhat far-fetched to hold that the non-occurrence of some event, which was not within the contemplation or even the imagination of the parties, was an implied term of the contract."

Two striking illustrations illumine this criticism :—

"The Campanile at Venice fell a few years ago after standing for many centuries. One can figure the case of an artist who had entered into a contract to make a painting of the Campanile. That this contract should be treated as frustrated by the collapse of the Campanile is a reasonable view, but it seems somewhat far-fetched to suggest that this is so because it was an implied condition of the contract that the Campanile should remain standing, instead of simply putting it upon the supervening impossibility of fulfilment."

"A tiger has escaped from a travelling menagerie. The milk girl fails to deliver the milk. Possibly the milkman

<sup>1</sup> "The room of the fiction," said Lord Wright, "is better than its company. Not only is it undesirable that English law should be defaced by superfluous solecisms and illogical phrases, but the ghost of the fiction has, I fear, actually delayed and hindered in England the systematic and scientific study of this important branch of law. I should like to see it forgotten for good and all here and now. But it is certainly doomed": *Legal Essays and Addresses*, 33. See also at 384, 385: "The law says that in certain events a contract shall no longer bind ; or does so, not because the parties have so agreed, but rather because they have not agreed at all about it. *The contract has become inapplicable to the facts of the case. Why then call it an implied contract, a fiction which can serve no purpose and can only confuse?* A fiction was adopted in the past merely as a device to justify a court in less enlightened days when it was applying a novel doctrine and was doing so on the analogy of, and by way of extending, a familiar rule . . . A modern court should realise what is its ideal, that of doing justice according to the actual facts, though on the lines of established law." (Author's italics.)

<sup>2</sup> See the observations of Lord Wright upon "the objective theory of contract" 55 L.Q.R., at 197, 198.

<sup>3</sup> *James Scott & Sons, Ltd. v. Del Sel* [1922] S.C. 592, 596, 597.

may be exonerated from any breach of contract, but even so, it would seem hardly reasonable to base that exoneration on the ground that 'tiger days excepted' must be held as if written into the milk contract."

The question whether such an implied term existed was a question "arising under the contract."<sup>1</sup>

## B. TWO REPORTS

### 1. BUCKMASTER COMMITTEE; PRE-WAR CONTRACTS

In 1917 a committee was appointed by the Board of Trade to consider and report on the position of British manufacturers and merchants after the war in respect of pre-war contracts made with persons or companies in the United Kingdom or in allied or neutral countries, the fulfilment of which had been prevented or impeded by the war. Viscount Buckmaster presided. The committee (which included Mr. F. D. MacKinnon, K.C., as he then was) heard evidence from Mr. J. A. Roche, K.C. (as he then was), and were supplied by Mr. R. A. Wright, K.C. (as he then was), with certain written notes of the law.

In its report, made in 1918, the committee stated the principles relating to impossibility and frustration.<sup>2</sup>

The statement of the Buckmaster Committee was adopted, and is set out in full, by the *Andrewes-Uthwatt Committee*, who, in May, 1939, reported to the Lord Chancellor.<sup>3</sup> With that report they agreed in principle and "independently arrived at much the same standpoint."<sup>4</sup>

<sup>1</sup> So also, Lord Dunedin; the House of Lords affirming the decision: [1923] S.C. (H.L.) 37, 40, 42; Lord Cave, L.C., and Lord Shaw expressly laid aside the question of frustration (see *per* Lord Sumner in *Hirji's Case* [1926] A.C. 497, 512).

<sup>2</sup> Report of the committee appointed by the Board of Trade to consider the position of British Manufacturers and Merchants in Respect of Pre-War Contracts: (1918), Cd. 8975, para. 10.

For a summary of the law before 1914, see *Effect of War on Contracts*, A paper by Mr. Leslie Scott, K.C. (as he then was), laid before the International Law Association in 1913: (1914), 30 L.Q.R. 77-90. For a summary of the decisions until 1917, see an essay prepared for the committee by F. D. MacKinnon, K.C. (as he then was).

<sup>3</sup> Report of the Committee on Liability for War Damage to the Subject-Matter of Contracts (1939), Cmd. 6100, para. 4.

<sup>4</sup> Paragraph 11. The Buckmaster Committee considered and substantially rejected four remedies suggested by witnesses: (a) cancellation; (b) compensation; (c) writing off future loss against payments in respect of excess profits; (d) revision of contracts. Relief was afforded in special circumstances in the case of certain contracts made before 4th August, 1914, by the Courts (Emergency Powers) Act, s. 1 (1), which, the committee thought, might be extended to all contracts.

By the Courts (Emergency Powers) Act, 1919, power was given to the court to *suspend, or annul, or with consent amend, any contract made before 1st January, 1917, where, owing to specified causes occasioned by the war, the contract could not be enforced according to its terms "without serious hardship."*

The statement of the law by the Buckmaster Committee is as follows :—

“ *Prima facie* if a man binds himself by contract unconditionally to do that which turns out to be impossible he will be held to his bargain and have to pay damages for his failure to perform.

If, however, the impossibility arises from a cause that neither party can reasonably have contemplated when the contract was made, and as to which the terms of the contract make no provision,<sup>1</sup> a man will not be so bound ; the matter being unforeseen he is not taken to have promised unconditionally nor, for the same reason, has he stipulated for any condition of excuse.

If relief from the burden of a contract because performance proves to be impossible is given, it is because the court holds that it was an implied term of the contract that it should be dissolved in the event which has arisen and created the impossibility.

Impossibility, for this purpose, means commercial impossibility. Mere increased cost of performance, unless to an enormous and extravagant extent, does not make it impossible.<sup>2</sup> A man is not prevented from performing by economic unprofitableness, unless the pecuniary burden is so great as to approximate to physical prevention.

If the contract is dissolved under this doctrine, the rights and obligations of both parties disappear as from the date of dissolution. But till that date the contract is good ; therefore, any payment made or any right accrued, according to the terms of the contract while it was in force, will not be disturbed or varied.<sup>3</sup>

Finally, the court can only declare the contract dissolved or not dissolved. If it is not dissolved it remains effective according to all its terms in their full force.<sup>4</sup> The court cannot in any way alter its terms, or modify them, or in any

<sup>1</sup> “ According to modern authority the fact that the contract refers in terms to the supervening cause of impossibility does not in all cases prevent the application of the doctrine of frustration if the court is satisfied that the supervening cause has operated to such an extent as to destroy the substratum of the contract.” Note by Andrewes-Uthwatt Committee : Cmd. 6100, para. 4.

<sup>2</sup> See *Blythe's Case* (1916), 114 L.T. 753, 755, per Scrutton, J. : *supra*, 399.

<sup>3</sup> This statement must now be read, subject to the *Fibrosa Case* [1943] A.C. 32. Where there is a *total failure* of consideration, money paid in advance before frustration of the adventure occurred may be recovered in *quasi-contract, dehors the contract*, as under the *common indebitatus* count, as money had and received. See per Viscount Simon, L.C., at 47 and per Lord Wright, at 71.

The contract, however, may *exclude* repayment. See per Viscount Simon, L.C., in the *Fibrosa Case* [1943] A.C. 43.

<sup>4</sup> The *Larrinaga Case* (1922), 27 Com. Cas. 160, 178, per McCardie, J.

way vary or adjust the rights and obligations of both parties.<sup>1</sup> And if it is not dissolved, and there is a breach, the court cannot mitigate or lessen the full measure of damages to which the other party is legally entitled by such breach.

If the obligations undertaken become illegal, either by reason of the other party to the contract becoming an enemy<sup>2</sup> or by reason of a duly constituted authority lawfully prohibiting its performance,<sup>3</sup> the contract is dissolved, unless the illegality is of so temporary a character that the time for the performance of the obligations may not have elapsed before the illegality ceases.<sup>4</sup>

In certain cases the principle stated above may to some extent be modified by the provisions contained in the contract.

In these cases the parties to the contract will be bound by the provisions of their own agreement and these may prevent the contract from being at once dissolved even if a duly constituted authority lawfully prohibits the performance of the obligations undertaken. Such general provisions, however, if suspensory in their nature, could not prolong a contract indefinitely, and if the conditions produced by the war continue beyond the period for which the contract was originally to be performed, the contract would then be dissolved. To hold otherwise would be to make a new contract for the parties and to substitute it for one which has been frustrated and thus to make the obligations originally undertaken substantially different."<sup>5</sup>

## 2. LAW REVISION COMMITTEE; CHANDLER v. WEBSTER

In 1934, the *Law Revision Committee* was appointed by Viscount Sankey, L.C., to consider how far such legal maxims and doctrines as the Lord Chancellor might from time to time refer to the committee required "revision in modern conditions." In 1937, the following subject was referred: "Whether, and if so, in what respect, the rule laid down or applied in *Chandler v. Webster* [1904] 1 K.B. 493, requires modification . . ."

<sup>1</sup> *Russkoe, etc. v. John Stirk & Sons, Ltd.* (1922), 10 Ll. L. Rep. 214, 217, per Atkin, L.J.; the *French Marine Case* [1921] 2 A.C. 494, 523, per Lord Parmoor.

See also the *Luxor Case* [1941] A.C. 108, 137, per Lord Wright, that the judges have "no right to make contracts for the parties. Their province is to interpret contracts." And see the *Constantine Case* [1942] A.C. 154, 185: "The court is not claiming to exercise a dispensing power, or to modify or alter contracts."

<sup>2</sup> Thus, *In re Badische Co., Ltd.* [1921] 2 Ch. 331, 380, 381, per Russell, J.

<sup>3</sup> *Metropolitan Water Board v. Dick, Kerr & Co.* [1918] A.C. 119, *infra*, 490.

<sup>4</sup> *Andrew Millar & Co. v. Taylor & Co.* [1916] 1 K.B. 402.

<sup>5</sup> See per Viscount Haldane in the *Tamplin Case* [1916] 2 A.C. 307, 406, 407.

The committee recommended that the rule be changed.<sup>1</sup>

The problem could be reduced to this :

"would it be difficult for the court, *when implying a hypothetical term that the contract should be dissolved, to go on and to imply also another equally hypothetical term ?*"<sup>2</sup>

Thus the theory of an "implied term" is rejected.

"There is no doubt that a court will *hesitate to construct a contract for the parties*"—the verb is significant—"but, under certain circumstances, it is *necessary in the interests of justice to imply a term which was not in the contemplation of the parties,*"

that is to say, to construct a contract for the parties.

"An illustration of this is the doctrine of impossibility of performance itself, because the doctrine is applicable only in those cases in which it is clear that the parties did not themselves have the event in contemplation. In those cases, in spite of the fact that the promise is stated in positive terms, *the law implies a further term* excusing performance on the ground of impossibility."

## C. JURISTIC CRITICISM

### I. IN ENGLAND

#### 1. Professor H. C. Gutteridge

The obscurity and the complexity of the doctrine of frustration have been severely criticised by Professor H. C. Gutteridge, K.C.<sup>3</sup>

(a) In the "*Coronation Seat Cases*" the real issue, he argues, was not whether performance had become impossible, but whether the consideration had failed.<sup>4</sup> The cases were decided, however, on the ground of impossibility. "This led to the importation of the fiction of an implied condition into the matter. The consequences were far-reaching; the implication of a condition that a certain state of affairs should continue to exist had its repercussions in the case law of the war period . . ."<sup>5</sup>

<sup>1</sup> *Infra*, Law Revision Committee, Seventh Interim Report. (Rule in *Chandler v. Webster*.) May, 1939, Cmd. 6009. *Infra*, 619.

The law has since been changed by the Law Reform (Frustrated Contracts) Act, 1943, which applies to contracts frustrated on or after 1st July, 1943. *Infra*, Chap. XXV.

<sup>2</sup> (1939), Cmd. 6009, at p. 6; author's italics.

<sup>3</sup> H. C. Gutteridge, *Contract and Commercial Law* (1935), 51 L.Q.R. 108-112.

<sup>4</sup> See Smith, *Leading Cases* (1929), 13th ed., vol. 2, 614, 615. In *Krell v. Henry* (1902), 18 T.L.R. 823; [1903] 2 K.B. 740, the defendant contended before Darling, J., that there had been a total failure of consideration, but both Darling, J., and the Court of Appeal decided the case upon the principle laid down by Blackburn, J., in *Taylor v. Caldwell* (1863), 3 B. & S. 826, and by Bowen, L.J., in *The Mooreock* (1889), 14 P.D. 64, 68.

<sup>5</sup> 51 L.Q.R., at 109.



The next stage came with the "*Frustration Cases*." It was not that the subject-matter of the contract was discharged,<sup>1</sup> or that the law had permanently changed, or that there was a "non-occurrence of a predetermined state of affairs."

"It arose from the fact that performance had been delayed to such an extent by causes arising out of hostilities that, although it was 'possible' in the strict sense of the word to resume performance when peace conditions prevailed, the obligor was required to perform something entirely different from the obligation which he assumed when he entered into the contract. In other words, the issue was whether inordinate delay which completely changed the nature of performance must be regarded as exonerating the obligor from performance. The solution which was arrived at is crystallised in the words of Lord Dunedin,<sup>2</sup> which define frustration as an interruption which may be 'so long as to destroy the identity of the work or service, when resumed, with the work or service when interrupted.'"<sup>3</sup>

"The principle of frustration based on inordinate delay is almost exclusively found in decisions relating to charterparties." The principle, however, is of *general application*.<sup>4</sup>

"But the mere fact that a contract has become more difficult of performance or that it would ruin the obligor financially to carry it out is insufficient to constitute frustration. So also where the contract has made full and complete provision for the contingency which has occurred there is no room for the doctrine.<sup>5</sup> The courts have been staunch upholders of the sanctity of contract."<sup>6</sup>

(b) *The doctrine of frustration*, Professor Gutteridge concludes, is thus "*of limited scope*"; it is doubtful whether it is a "complete solution of the very difficult and delicate questions" where performance has been prevented or delayed by circumstances beyond the promisor's control.

"It is perhaps unfortunate," he declares, "that it was found necessary to resort to implications of the intentions of the parties when they entered into the contract. Attempts to discover what the parties would have done if they had contemplated the circumstances which occurred have produced statements of the rule which are dangerously wide."

(c) "Frustration has at times been confused with the destruction of a *certum corpus*, with supervenient illegality and with

<sup>1</sup> *Taylor v. Caldwell* (1863), 3 B. & S. 826.

<sup>2</sup> *Metropolitan Water Board v. Dick, Kerr & Co.* [1918] A.C. 119, 128.

<sup>3</sup> (1935), 51 L.Q.R., at 110.

<sup>4</sup> Compare *The Penelope* [1928] P. 180.

<sup>5</sup> *Elliot v. Crutchley* [1906] A.C. 7, 9, a "Coronation case," where the owners had stipulated that if the review went off there was to be no liability.

<sup>6</sup> (1935), 51 L.Q.R., at 111.

failure of consideration, and the efforts of the courts and the text-book writers to frame a rule which would cover all these contingencies has done little except to increase the complexity of the existing law on the matter. It would seem that there is a very strong case for an authoritative restatement of the doctrine by the House of Lords."<sup>1</sup>

## 2. *Sir Arnold D. McNair*

The most systematic exposition is contained in the *Second Edition* of Sir Arnold D. McNair's *Legal Effects of War*.<sup>2</sup> He concludes that

"the balance of judicial authority is in favour of the implied term as the basis of the doctrine of frustration, and history appears to be on that side."<sup>3</sup>

*Five principal theories* are discussed.<sup>4</sup>

(a) "The theory of the implied term, which the law imputes to the parties,<sup>5</sup> in order to regulate a situation which in the eye of the law the parties themselves would have regulated by agreement if the necessity had occurred to them."

(b) "The theory of the disappearance of the basis or foundation of the contract theory: *non haec in foedera veni*."<sup>6</sup>

(c) "Lord Wright's theory to the effect that, the parties not having dealt with the matter, the courts must determine what is just, must find a reasonable solution for them, a theory which, we suggest, involves the importation of another implied term."

(d) The theory of *common mistake*;

(e) The theory of *supervening impossibility*.

### (a) *Theory of "implied term"*

Five statements of the theory of "*the implied term*" are quoted.

*First*, from Earl Loreburn's speech, in the *Tamplin Case* :—

"In most of the cases it is said that there was an implied condition in the contract which operated to release the parties

<sup>1</sup> (1935), 51 L.Q.R., at 111, 112. The doctrine is criticised in the *Notes to Smith, Leading Cases*, vol. 2, 632, 633, which appear to follow the dissenting judgments of Bovill C.J., in *Jackson v. Union Marine Insurance Co., Ltd.* (1873), L.R. 8 C.P. 572, 585-593, and Cleasby, B., in (1874), L.R. 10 C.P. 125, 128-132, *infra*, 474-476.

<sup>2</sup> Chap. 6, *Frustration of Contract*, 143-152. (The chapter is based upon McNair's essay, *Frustration of Contract by War* (1940), 56 L.Q.R. 173-207, where the theories are discussed at 173-182).

<sup>3</sup> *Ib.*, 151. See *The Constantine Case* [1942] A.C. 154, 163, 186, *per* Viscount Simon and *per* Lord Wright. See also *Heyman v. Darwins, Ltd.* [1942] A.C. 356.

<sup>4</sup> *McNair*, 143. Chorley (1945), 8 Mod. L. Rev. 89, reluctantly agrees.

<sup>5</sup> But if the law "imputes" a term to their contract, this term is not "implied." See Williston, a. 3. It appears that into this definition of the "classic theory," constructive term has been imported.

<sup>6</sup> *Per* Lord Finlay, L.C., in the *Bank Line Case* [1919] A.C. 435, 442.

from performing it, and in all of them I think that was at bottom the principle upon which the court proceeded. It is, in my opinion, the true principle, for no court has an absolving power, but it can infer from the nature of the contract and the surrounding circumstances that a condition which is not expressed was a foundation on which the parties contracted."<sup>1</sup>

*Secondly*, from Lord Sumner's speech in the *Bank Line Case* :—

"The theory of dissolution of a contract by the frustration of its commercial object rests on an implication, which arises from the presumed common intention of the parties."<sup>2</sup>

*Thirdly*, from the advice of the Privy Council, delivered by Lord Sumner in the *Hirji Case* :—

"Frustration . . . is explained in theory as a condition or term of the contract, implied by the law *ab initio*, in order to supply what the parties would have inserted had the matter occurred to them, on the basis of what is fair and reasonable, having regard to the mutual interests concerned, and of the main objects of the contract . . . It is irrespective of the individuals concerned, their temperaments and failings, their interests and circumstances. It is really a device, by which the rules as to absolute contracts are reconciled with a special exception which justice demands."<sup>3</sup>

This passage, it is submitted, states that frustration does not depend upon the intention of the parties—the essence of an "implied term"; it is an *implication of law*, not an inference of fact.

*Fourthly*, a passage is cited from the judgment of Russell, J., in *In re Badische Co., Ltd.*<sup>4</sup>

"If the supervening events or circumstances are such that it is impossible to hold that reasonable men could have contemplated that event or those circumstances and yet have entered into the bargain expressed in the document, a term should be implied dissolving the contract upon the happening of the event or circumstances. The dissolution lies not in the choice of one or other of the parties, but results automatically from a term of the contract. The term to be implied must not be inconsistent with any express term of the contract."

Upon this analysis, it is *the law* that implies the term which,

<sup>1</sup> [1916] 2 A.C. 397, 403. This principle, Sir Arnold points out, was adopted in the *Metropolitan Water Board Case* [1918] A.C. 119, 127, 131.

<sup>2</sup> [1919] A.C. 435, 455. But this proposition of Lord Sumner is a direct negative of the "implied term." The word "*theory*," as is clear from Lord Sumner's speech in the *Hirji Case* [1926] A.C. 497, 510, is carefully chosen. An "implied term" is part of the "common intention" of the parties—the *real*, not the *presumed* common intention, much less an *implication* from that intention.

<sup>3</sup> [1926] A.C. 497, 510. Upon Lord Sumner's view, see Lord Wright's speech in *The Denny Mott Case* [1944] A.C. 265, 275.

<sup>4</sup> [1921] 1 Ch. 331, 379.

*ex hypothesi*, at the time when the contract was made, was not in the mind or intention of the parties. The law, having implied that term *after the event*, proceeds to read that term retrospectively into the contract. *Notionally*, therefore, the term was part of the contract when it was made; hence it must not be inconsistent with an express term.

*Fifthly*, Viscount Simon, L.C., in *The Constantine Case*,<sup>1</sup> declared:—

“The most satisfactory basis, I think, on which the doctrine can be put is that it depends on an implied term in the contract of the parties.”

(b) *Theory of disappearance of foundation*

The speech of Viscount Haldane in the *Tamplin Case* contains the classical statement of the *theory of the disappearance of the foundation of the contract*. In the absence of a plain, contrary intention, the contingency—namely, the destruction of an essential specific thing without fault of the parties—is treated “as being one about which no bargain at all was made.”

“Although the words of the stipulation may be such that the mere letter would describe what has occurred, the occurrence itself may be of a character and extent so sweeping that the foundation of what the parties are deemed to have had in contemplation has disappeared, and the contract itself has vanished with that foundation.”<sup>2</sup>

The word “deemed” indicates resort to a legal fiction: the parties did not have the event or its foundation in mind; concerning that event no contract was made.<sup>3</sup>

This theory was found “attractive,” continues Sir Arnold McNair, by Goddard, J., in the *Tatem Case*,<sup>4</sup> a case of the Spanish Civil War. The parties had there *foreseen* the possibility of the frustrating event, but had *not provided* for its effect:—

“If the foundation of the contract goes, either by the destruction of the subject-matter or by reason of such long

<sup>1</sup> [1942] A.C. 154, 163.

<sup>2</sup> [1916] 2 A.C. 397, 406.

<sup>3</sup> Sir Arnold cites from the speech of Lord Finlay, L.C., in the *Bank Line Case* [1919] A.C. 435, 441, the phrase, “a vital change of circumstances,” and regards Lord Finlay as an adherent of the disappearance of the foundation theory. Citing Lord Finlay’s statement of the law in the *Larrinaga Case* (1923), 29 Com. Cas. 1, 7, he says: “Both theories under discussion come very close together.” Lord Finlay there said: “If, in consequence of war, there is a compulsory cessation of the execution of a contract for construction of works of such a character and duration that it fundamentally changes the conditions of the contract and could not have been in the contemplation of the parties when it was made, to hold that the contract still subsists would be ‘not to maintain the original contract but to substitute a different contract for it’.” In this speech Sir Arnold finds the *disappearance of the foundation* coupled with the change of circumstances which could not have been in the contemplation of the parties.

<sup>4</sup> [1939] 1 K.B. 132, 139, *supra*, 415, 416.

Sir Arnold cites Scrutton, 112: “‘Unforeseen circumstances’ means circumstances for which the written contract makes no (*quære*, full) provision”

interruption or delay that the performance is really in effect that of a different contract, and the parties have not provided what in that event is to happen, the performance of the contract is to be regarded as frustrated."<sup>1</sup>

Sir Arnold McNair suggests that this basis also rests upon an implied term. Whether the parties failed to foresee the frustrating event (as in the coronation cases), or did foresee it (as in the requisition cases), and failed to provide for all its consequences,

"is it unreasonable for the law to impute to them, and to imply in the contract, a term to the effect that upon the occurrence, and as a result, of these events and their consequences they would have regarded the contract as being at an end?"<sup>2</sup>

But this term, *imputed by law*, is not a true "*implied term*."

"If the continuance of a state of affairs or the non-happening of a certain event clearly underlies the whole contract—whether the parties say so or not—and if that state of affairs comes to an end or that event happens, then we suggest that it is reasonable for the courts to imply a condition that the contract comes to an end."<sup>2</sup>

It does not matter, he says, whether the frustrating event was foreseen or not, provided that after that event "performance under the contract would be performance of another contract," and the parties have not agreed that, despite that event, performance should take place.<sup>3</sup>

Sir Arnold McNair suggests that the antithesis between these two theories is unreal and that they can be reconciled.

"Is not the disappearance of the basis of the contract really an inference of fact which is drawn by the court and upon which the court bases the implication of a term to the effect that the parties are thereupon discharged?"<sup>4</sup>

<sup>1</sup> In such a case, however, Lord Wright had doubted, in *The Maritime Fish Case* [1935] A.C. 524, 529, whether a term "resolutive of the contract" should be implied. But this observation was *obiter*.

<sup>2</sup> McNair, 149.

<sup>3</sup> *Ib.*, Sir Arnold differs from Lord Wright. See *Legal Essays and Addresses*, 255: "If the contingency had been known to them as something which might happen, and they had not provided for it, the contract ought, it would seem on ordinary principles, to stand."

See also the *Maritime Fish Case* [1935] A.C. 524, 529:

"It may be questioned whether the court should imply a condition resolutive of the contract (which is what is involved in frustration) where the parties might have inserted an express condition to that effect but did not do so, though the possibility that things might happen as they did was present to their minds when they made the contract."

Upon this point the author agrees, with respect, with the view of Sir Arnold McNair, and with the opinion of Goddard, J., in the *Tatem Case* [1939] 1 K.B. 132, 138.

<sup>4</sup> McNair, 150, citing Cleasby, B., who dissented in *Jackson's Case* (1874), L.R. 10 C.P., at 141.

(c) *Theory of supplementing power of the court*

*The third theory* is found in an *Address* of Lord Wright :—

“ This whole doctrine of frustration has been described as a reading into the contract of implied terms to give effect to the intention of the parties. It would be truer to say that the court in the absence of express intention of the parties determines what is just. Something of the same sort happens in the many cases where what is reasonable, in a matter not dealt with by the express agreement of the parties, is so treated by the court as to be imported into the contract. It is, as we shall see later, the incurable habit of commercial men in their contracts not to anticipate expressly or to provide for all that may happen.”<sup>1</sup>

Lord Wright cites certain authorities upon the implication by the court, where no price is specified, of an obligation to pay a *reasonable price*<sup>2</sup>; upon the implication, where no time is specified, to do the act *within a reasonable time*<sup>3</sup>; upon the implication, where the contract does not precisely define assortment or quality, of *what is reasonable*.<sup>4</sup>

These authorities Sir Arnold McNair analyses; in the first three, he asserts, “ the court gave effect to the presumed intention of the parties by implying certain terms.”<sup>5</sup> That, of course, is true, but those terms were not in the intention of the parties; the law presumed that they were.

(d) *Theory of common mistake*

This is an inadequate explanation of the effect of “ supervening impossibility.”<sup>6</sup>

(e) *Theory of supervening impossibility*

This explanation, said Viscount Simon, L.C., in *The Constantine Case*,<sup>7</sup> is “ at once too broad and too narrow.” Commercial “ impossibility ” does not discharge a contract; a contract may, on the other hand, be frustrated even though performance be physically “ possible.”

(f) *Conflict of theories*

*The true explanation of the modern doctrine of frustration*, it is submitted, is that given by Lord Sumner and perfected by Lord Wright.

<sup>1</sup> McNair, 150; cited from *Legal Essays and Addresses*, 258.

<sup>2</sup> *Acebal v. Levy* (1834), 10 Bing. 376: cf. Sale of Goods Act, 1893, s. 8 (2).

<sup>3</sup> *Ford v. Cotesworth* (1868), L.R. 4 Q.B. 127, 123, 124, per Blackburn, J.; (1870), L.R. 5 Q.B. 544; *Hick v. Raymond & Reid* [1893] A.C. 22, 29, 32, per Lord Watson.

<sup>4</sup> *Hillas & Co. v. Arcos, Ltd.* (1932), 38 Com. Cas. 23.

<sup>5</sup> 56 L.Q.R. 181.

Thus, Lord Wright in *The Constantine Case* [1942] A.C. 154, 186, referring to Viscount Haldane in *The Bank Line Case* [1919] A.C. 435, 445.

<sup>7</sup> [1942] A.C. 154, 164.

The *conflict of judicial theories* remains—"an unfortunate diversity in the terms used in different cases"<sup>1</sup>; to reconcile them is a difficult, if not an impossible, task.

Lord Wright, when speaking at Harvard in 1936, of *The Common Law in its old Home*, observed:—

"In general, such cases of dissolution are said to be by virtue of an implied term in the contract between the parties. But that is a fiction: for the whole basis of this rule is that the parties did not contemplate and hence did not by contract provide for the happening of the resolute condition. Hence it is not true in any case to treat it as an 'implied' condition. . . . Law would be simpler, . . . if the term 'implied condition' or contract were not used except in cases where from the actual circumstances an actual intention is properly inferred or implied as a fact. What is so often called an implied term or a term implied by law simply means that there is no agreement or intention at all on the point, but the law imposes the term in order to do justice. This has often been pointed out by great judges. It is better and simpler expressly to recognise this; a failure to do so has sometimes led to confusion and error. Errors in language are apt to lead to erroneous conclusions in practice. In this, as in other respects, law will have to get its terminology right."<sup>2</sup>

Pollock, writing to Holmes in 1920, of revising "the old book on Contract" and of a "somewhat large rearrangement, such as a new head of Conditional Contracts with 'frustration of adventure' prominent, significantly observes:—

"After all, is not the implied condition in those cases something of a fiction to screen rules of policy imposed on the parties and becoming, like equity of redemption, a real part of the contract only after that pressure has been applied?"<sup>3</sup>

### 3. Professor P. H. Winfield

Professor Winfield, in the *Eleventh Edition of Pollock on Contracts*<sup>4</sup> summarises *five theories* of frustration and, without adding a new theory, "suggests a rather different line of approach to the principle underlying the doctrine of frustration."

The *theories* are these:—

- (i) The theory of the "*implied term*."<sup>5</sup>
- (ii) The theory that "*the foundation of the contract has been annihilated by the frustrating event*."

<sup>1</sup> Per Lord Sumner in the *Bank Line Case* [1919] A.C. 435, 457, 458, where these terms are collected. See also the references collected in 56 L.Q. R. 175, 176

<sup>2</sup> *Legal Essays and Addresses*, 379, 380. (Author's italics.)

<sup>3</sup> *The Pollock-Holmes Letters* (1942), vol. 2, 38, 39.

<sup>4</sup> (1942), 232-235.

<sup>5</sup> *Ib.*, at 233: "The balance of judicial theory seems to be in favour of this view."

(iii) The theory of *failure of consideration*.<sup>1</sup>

(iv) The theory of *common mistake*.

(v) The theory of *quasi-contract*.

*Quasi-contract* was put forward in the *First Edition* of this book.

Upon this, Prof. Winfield makes three observations: *First*, it is difficult to discover any English decision that applies quasi-contract to frustration. *Secondly*, the essence of quasi-contractual liability is *unjust benefit* or *unjust enrichment* and often neither party has done or received anything under a frustrated contract. *Thirdly*, the rule, that upon frustration the parties *in general* remain as they were at the frustrating event, "frequently results in perpetuating an unjust benefit rather than in enforcing its adjustment."<sup>2</sup>

(a) *Theory of quasi-contract criticised*

English decisions, it is true, do not base frustration upon quasi-contract; only recently has the category been judicially recognised in the highest tribunal.<sup>3</sup> Weighty criticisms, these are, indeed, but, they are not, it is submitted, conclusive. To the author the most serious criticism appears to be that the concept of *quasi-contract* has been applied, not to a *condition* imposed by the court but to a *liability to return money*. In other words, only when frustration has already operated does a quasi-contractual obligation in certain circumstances arise.<sup>4</sup> The author accepts this criticism and agrees that the term "*quasi-contract*" should be reserved for *obligations to pay*, imposed upon the parties by the court or the Legislature.

A *condition* imposed by the court that, upon the occurrence of a frustrating event the contract is dissolved, is a condition read by the court *into the contract*. It is the court's view, in the circumstances of the case, of the way in which *the contract* should be construed, and *in that sense it may be regarded as part of the contract*.<sup>5</sup>

<sup>1</sup> "Its weakness is the difficulty of establishing any clear line between frustration and failure of consideration which is due to no fault of either party" (*ib.*, at 234).

<sup>2</sup> *ib.*, at 234. See also (1941), 56 L.Q.R. 142, 143. But see now *The Fibrosa Case* [1943] A.C. 32, *infra*, and Law Reform (Frustrated Contracts) Act, 1943.

<sup>3</sup> *The Fibrosa Case* [1943] A.C. 32, 46, 61, *per* Viscount Simon, L.C., and *per* Lord Wright.

<sup>4</sup> For example, under the *Fibrosa* decision [1943] A.C. 32, or, since 1st July, 1943, under the Law Reform (Frustrated Contracts) Act, 1943.

<sup>5</sup> "Our own opinion . . . is that when once it is grasped that there is always an element of fiction in even the genuinely 'implied term' (*supra*), its application to frustration is only a matter of degree. The court may be going much farther here in supplementing the contract than it does in stating what is a reasonable price where the parties have fixed no price; but it is still dealing with a contract that did once exist, and, in that sense, is interpreting it": Professor Winfield, in his *Review of the First Edition*: (1941), 56 L.Q.R. 143.



(b) *A different approach ; elasticity of 'the reasonable'*

Professor Winfield, suggesting "a rather different line of approach to the principle," points out that judicial decisions upon frustration "appear to contemplate the following situation"—

"After the formation of a contract, certain sets of circumstances arise which, owing to the fault of neither party, render fulfilment of the contract by one or both of the parties impossible in any sense or mode contemplated by them. These sets of circumstances have been more or less defined by the courts and are held by them to release both parties from any further obligation to fulfil the contract. The question which the judge has to solve is this. Would any reasonable third party consider the effect of such circumstances as altering the obligation of one or both of the parties to such an extent as to make the contract no longer capable of being enforced? The 'reasonable third party' is the court itself. Whatever additional theory the courts have adopted, this is the basic principle on which they must ultimately decide the problem."<sup>1</sup>

All the theories are "more or less complete alternative ways of stating or perhaps masking the basic principle." In determining the solution of a "reasonable" third party, "of necessity an elasticity" comes into play. On apparently similar facts different judges may reach different results. That happens also in the "judicial application of 'reasonable' in the law of negligence as a tort."

"But it is useless to attempt to make 'reasonable' a precisely exact term. Indeed, it would be mischievous to do so, for a good deal of injustice would result from trying to mechanise the law where a certain amount of pliability in its application is essential."<sup>1</sup>

With this analysis the author respectfully agrees. Of particular value is the explanation which fits certain conflicting decisions, viz., that, in the last resort, no principle, but merely a difference of opinion was involved, upon what, in the circumstances, was "reasonable." Decisions upon frustration, in the nature of things, can never be wholly harmonious or consistent.

(c) *Lord Wright's Review*

Lord Wright, in a *critique* of Prof. Winfield's edition, quotes as "factual and realistic," this analysis—which must be read, not by itself, but "in its context of a full and illuminating

<sup>1</sup> *Pollock on Contracts*, *ib.*, at 235. See also (1942), 58 L.Q.R. 281. Lord Wright begins his speech in *The Denny Mott Case* [1944] A.C. 265, 273, by quoting, with approval, the first two sentences of this description. See also *ib.*, at 274: "The application of the general principle must depend on the circumstances of the particular case. No detailed absolute rules can be stated. A certain elasticity is essential."

survey of the authorities and a comprehensive statement of the general rules by Pollock.”<sup>1</sup> Lord Wright points out that frustration—“a function of the court’s interference in matters of contract” (not confined to “war circumstances”)—“has been and is still being, empirically developed and applied by decisions of the court . . .”<sup>2</sup>

“Its nature has been obscured by the introduction of references to implied conditions and other fictitious and adventitious concepts, such as intentions which the parties as reasonable persons should be presumed to have had in mind if they had, as in fact they had not, contemplated and provided for what eventually happened. But, as Lord Sumner has pointed out, the court is not concerned with the inquiry what the actual parties as hard bargainers would have agreed (a difficult psychological inquiry and purely conjectural), but what it is reasonable in the opinion of the court that the court should decide. The convenient phrase ‘implied condition,’ generally used to justify the court’s interference, is artificial and may be misleading. The ‘condition’ which is here meant is one implied by law, not agreed to by the parties. It is imposed by the court *ab extra*, though with due regard to the actual terms of the contract and the surrounding circumstances.”<sup>3</sup>

#### 4. Dr. McElroy and Dr. Glanville Williams

(a) *Frustration : Delay caused by Impossibility.*—Dr. McElroy, in a valuable treatise edited by Dr. Glanville Williams, examining all the decisions on impossibility, failure of consideration and frustration, and endeavouring to distinguish and to separate the three concepts, would restrict frustration to cases of *undue delay arising from a cause for which neither party is responsible in law*.<sup>4</sup>

The implication adopted by Blackburn, J., was *fictitious*, “imputed to them *ab extra* by the law itself.”<sup>5</sup> Only in cases of *impossibility* is this implication permitted; the principle can only be applied where there is a “perishing” of a “given person or thing” and where performance was dependent on the continued existence of that given person or thing.”<sup>6</sup>

Many cases where the principle has “seemingly been applied in a wider context” were, or could have been, decided on

<sup>1</sup> Lord Wright, *Pollock on Contracts* (1943), 59 L.Q.R. 122-128, at 124.

<sup>2</sup> See *The Constantine Case* [1942] A.C., at 182, 183.

<sup>3</sup> 59 L.Q.R. 124.

<sup>4</sup> R. G. McElroy, edited with additional chapters by Glanville L. Williams, *Impossibility of Performance* (1941), p. xxxiv. See, however, Williams, *Law Reform (Frustrated Contracts) Act* (1943), p. 21, note 7, observing that it is “hopeless to attempt to change current usage so radically.”

<sup>5</sup> *Taylor v. Caldwell*, 3 B. & S. 826, 839; *op. cit.*, 63.

<sup>6</sup> *Op. cit.*, 66.

some other principle. Thus the "*Coronation Cases*" properly depend upon *failure of consideration*.<sup>1</sup> In *Krell v. Henry*,<sup>2</sup> the parties "meant to buy and sell a view of the procession"<sup>3</sup>; the contract was not void, but voidable by the obligor.<sup>4</sup>

The rule in *Taylor v. Caldwell* may discharge one party without discharging the other; it is not the case—as Blackburn, J., implied that it was—that, on facts like those, *both* parties are discharged by the same legal principle.<sup>5</sup> If the hirer had elected to hold his entertainments in the pleasure gardens, he would have been entitled to do so. In *Krell v. Henry*, had the hirer been content to abide by the contract, the letter would have been bound.<sup>6</sup>

(b) *Failure of Consideration, in Origin*.—"Frustration" is historically a development of the principle of failure of consideration, and, in origin, at all events, was but a specialised application of that principle to maritime cases."<sup>7</sup> The principle was first applied where there had been a breach of contract and was only later applied to circumstances of impossibility. "Frustration of the Adventure" was originally "no more than a metaphor to denote the application of the principle of failure of consideration to the circumstances of delay."<sup>8</sup> Where delay prevented the shipowner from fulfilling his obligations and he had made no provision in the contract, the delay was a breach for which he was liable in damages. Where the delay was so long as to deprive the charterer of any benefit, it amounted to a total failure of consideration and not only entitled him to damages, but freed him from the contract; the shipowner's delay frustrated the object of the charterer.<sup>9</sup> In *MacAndrew v. Chapple*, Willes, J., said:—

"... a delay or deviation, which, it has been said, goes to the whole root of the matter, deprives the charterer of the whole benefit of the contract, or entirely frustrates the object of the charterer in chartering the ship, is an answer to an action for not loading a cargo . . ."<sup>10</sup>

The "new principle" was soon applied to cases where the delay was not due to a breach of contract—*Geipel v. Smith*<sup>11</sup> and *Jackson's Case*<sup>12</sup>—which "laid the foundation of the doctrine of frustration in its modern form, that is to say, in its application to the circumstances of excusable impossibility."<sup>13</sup>

<sup>1</sup> *Op. cit.*, 67, 88. Professor Winfield points out that failure of consideration was not mentioned in the judgments of the Court of Appeal (1942), 58 L.Q.R. 280.

<sup>2</sup> [1903] 2 K.B. 743.

<sup>3</sup> *Op. cit.*, 89.

<sup>4</sup> *Op. cit.*, 97.

<sup>5</sup> 3 B. & S., at 840; *op. cit.*, 99, 100.

<sup>6</sup> *Op. cit.*, 100.

<sup>7</sup> *Op. cit.*, 121.

<sup>8</sup> *Op. cit.*, 121.

<sup>9</sup> *Op. cit.*, 122.

<sup>10</sup> (1866), L.R. 1 C.P. 643, 648.

<sup>11</sup> (1872), L.R. 7 C.B. 404.

<sup>12</sup> (1874), L.R. 10 C.P. 125.

<sup>13</sup> *Op. cit.*, 124.

(c) *Frustration: only where contract "imperfectly expressed."*—In *Geipel v. Smith*<sup>1</sup> the contract was discharged "by reading with an express exception, namely, 'restraint of princes,' an implied term requiring performance to be made 'within a reasonable time.'" The implication was not—as in *Taylor v. Caldwell*—a fiction: "it merely supplemented what the parties had 'imperfectly expressed.'"<sup>2</sup> The two forms of implication are "mutually exclusive": *Taylor v. Caldwell* applies "only in the absence of a stipulation"; the other implication is justified only where the language of the contract is "imperfectly expressed."<sup>3</sup> The two forms of implication have been wrongly identified: impossibility has been called frustration. The modern doctrine of frustration involves two questions: *First*, has there been inordinate delay? *Secondly*, has this delay been caused by something for which the contract made "express though incomplete provision," or by something "for which the promisor was not liable in law?"<sup>4</sup> Before an implication is justified, the delay must be "a possibility within the contemplation of the contract . . . not actually present to the minds of the parties at the time of making it."<sup>5</sup>

"Where delay is caused by something which is a 'possibility within the contemplation of the contract'—and for which, therefore, the performing party is not *in law* responsible—and such delay lasts for a period which is wholly inordinate having regard to the known commercial object of *that* party, he (the performing party) is entitled, not merely to suspension of his obligation, but to be discharged completely from performance of the contract. In such a case the court will read with the express exception, or other similar provision, an implied term that the contract is to be performed 'within a reasonable time.'"<sup>6</sup>

The "combined effect of these two provisions" dissolves the contract.<sup>7</sup>

"'Frustration' is nothing more nor less than inordinate delay' resulting from temporary (and excusable) impossibility."<sup>8</sup>

(d) *Not a "device," but a rule of construction.*—Frustration, he says, is not a "device by which the rules as to absolute contracts are reconciled with a special exception which

<sup>1</sup> (1872), L.R. 7 Q.B. 404.

<sup>2</sup> *Op. cit.*, 129.

<sup>3</sup> *Op. cit.*, 130.

<sup>4</sup> *Op. cit.*, 131.

<sup>5</sup> *Per* Lord Watson, in *Dahl v. Nelson* (1881), 6 A.C. 38, 59; *op. cit.*, 131–133. See also *Hamlyn v. Wood* [1891] 2 Q.B. 488, 494, *per* Kay, L.J., and *The Bank Line Case* [1919] A.C. 435, 455, 456, *per* Lord Sumner: the implication in cases of frustration is "a matter of construction according to the usual rule."

<sup>6</sup> *Op. cit.*, 145.

<sup>7</sup> *Op. cit.*, 146.

<sup>8</sup> *Op. cit.*, 172. The two conditions of frustration are restated at 202, 203.

justice demands."<sup>1</sup> It is "a rule of construction in conformity with the accepted canons, by which a term is implied to supplement an intention which the parties have already, although imperfectly, expressed."<sup>2</sup> Lord Sumner wrongly identified *frustration* with the principle of *Taylor v. Caldwell*.<sup>3</sup> Discharge for undue delay is not "automatic." Where delay has lasted so long that it will presumably prove "inordinate," "either party may then take the initiative and declare the contract at an end (irrespective of the consent of the other) and then *both* are free. The date of dissolution, then, is the date when one party (i.e., either party) makes an intimation to that effect."<sup>4</sup>

(e) *The answer: In principle and on authority.*—First, the whole cumulative weight of the progressive *authority* of eighty years leaves no *locus standi* for such a restricted theory as "inordinate delay" and "a rule of construction" supplementing an intention "imperfectly expressed." Lord Sumner's expositions in *The Bank Line Case*<sup>4</sup> and in *The Hirji Mulji Case*<sup>5</sup> remain authoritative, as is clear from the speeches of Viscount Simon, L.C., and Lord Wright in *The Constantine Case*<sup>6</sup> and in *Heyman v. Darwins, Ltd.*,<sup>7</sup> and, more recently, from the speeches of Lord Wright in *The Denny Mott Case*,<sup>8</sup> and of Viscount Simon, L.C., and Lord Wright in *The Cricklewood Case*.<sup>9</sup>

*Secondly*, what, apart from authority, is the position *in principle*? To separate frustration from impossibility seems pedantic and wrong. Blackburn, J.'s principle in *Taylor v. Caldwell*<sup>10</sup>—upon the "perishing" of a "given person or thing"—was not a final statement for all time, but merely "the first statement of the doctrine in its modern form."<sup>11</sup> That "sanctity of contract" will be undermined there need be no fear: these cases—as the reports show—undergo scrutiny the most searching. To imply that in *Krell v. Henry*<sup>12</sup> Krell might seriously have

<sup>1</sup> *The Hirji Mulji Case* [1926] A.C. 497, 509, 510, *per* Lord Sumner.

<sup>2</sup> *Op. cit.*, 223.

<sup>3</sup> *Op. cit.*, 229, referring (at 230) to Lord Blackburn's speech in *Dahl v. Nelson* (1881), 6 A.C. 38, 53, that inordinate delay entitled "either of them, at least while the contract was executory, to consider it at an end"; and to Lord Shaw in *New Zealand Shipping Co. v. Société des Ateliers* [1919] A.C. 1: "If both parties go on, that is another and their own affair. But either can claim that the contract is void, and then both are free."

<sup>4</sup> [1919] A.C. 435, 450–460.

<sup>5</sup> [1926] A.C. 497, 507–511.

<sup>6</sup> [1942] A.C. 154, 184, 185. See Prof. Chorley's *Review*, in 5 *Modern Law Rev.*, 278–280, criticising this view of the law as "founded upon a static, rigid conception of sanctity of contract."

And see (1945), 9 *Camb. L. Journ.* 134, by "R.P.F.R."

<sup>7</sup> [1942] A.C. 356, 365, 383.

<sup>8</sup> [1944] A.C. 265, 274–276.

<sup>9</sup> (1945), 61 T.L.R. 202, 203, 206.

<sup>10</sup> (1863), 3 B. & S. 826.

<sup>11</sup> *Per* Viscount Maugham in *The Constantine Case* [1942] A.C., at 168.

<sup>12</sup> [1903] 2 K.B. 740; *infra*, 468–472.

thought that Henry would still take the flat—for the two *days* of June (and not the nights)—in order to contemplate a procession that would never pass, is surely unreal. If frustration were restricted to cases where a possibility was “within the contemplation of the contract” and where the language of the contract was “imperfectly expressed,” its essential basis would be gone. To assert that one party may be discharged and not the other, or that in a case where both parties are discharged each is discharged under “a distinct and different principle of law”—failure of consideration *and* an implication resulting from an express exception<sup>1</sup>—seems an unnecessary complication. To say that upon inordinate delay, *either* party may take the initiative and declare the contract at an end, and that only then, both parties are free—is to leave them in unnecessary suspense.

Frustration is a developing concept: like negligence, its categories are never closed but are as wide as the categories of human conduct. Its effect is immediate, automatic: it guillotines a contract and the contract, without the option of either party—accrued rights subsisting—is dissolved. If the parties later purport to act under it, they are really making a new contract. The court, applying enlightened common sense to do justice, decides whether the contract is at an end.

## 5. *Mr. H. W. R. Wade*

### (a) *A new approach*

In a closely reasoned essay,<sup>2</sup> Mr. H. W. R. Wade, regarding “the implied term” as artificial and the “fundamental assumption theory” as the most acceptable theory so far advanced, suggests another approach.

“When one is under a legal duty, whether created by contract or otherwise, and the performance required of him becomes legally or objectively impossible, the duty is extinguished . . . Nor is any new or secondary duty created to pay damages . . .”<sup>3</sup>

*Paradine v. Jane* is called in aid—

“—but where the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract.”<sup>4</sup>

The words “if he may” mean that the duty to perform lasts “while performance is still within the bounds of human possibility. That is to say, if the thing can be done at all, the

<sup>1</sup> *Op. cit.*, 139, 143, 146, on *Jackson's Case* (1874), L.R. 10 C.P. 123.

<sup>2</sup> *The Principle of Impossibility in Contract* (1940), 56 L.Q.R. 519-556.

<sup>3</sup> Cited from Corbin, 22 *Columbia L. Rev.*, 422; *ib.*, at 523.

<sup>4</sup> (1647), *Aleyn*, 26.

promisor must do it.”<sup>1</sup> If performance becomes impossible, the case falls outside the judgment in *Paradine v. Jane*.<sup>2</sup>

A man is bound by an absolute contract to do a thing not naturally impossible.<sup>3</sup> When is a promise “absolute,” or, rather, “alternative”?<sup>4</sup> When did a man “really give not one promise but two”—the promise of performance, and of damages in the event of non-performance?<sup>5</sup> An *alternative* promise (which depends upon the intention of the parties) is *either* the promise of an *act* with a promise of damages in the alternative, *or* the promise of an *event*,<sup>6</sup> which is “in reality a conditional promise of the payment of money—a contract of warranty, indemnity or insurance . . .”<sup>6</sup>

Mr. Wade proposes several *rules* to distinguish “alternative” from “simple” promises.<sup>7</sup>

“Where the promise is of a happening outside the control of the promisor, and known by the promisor so to be, the real promise given is one of warranty or insurance against the non-occurrence of the specified event—i.e., it is a promise of the payment of money upon condition.”<sup>8</sup> . . .

“Where a promise is given which . . . is likely to be impeded by some particular fact in the future, and both parties equally foresee this at the time of making the contract: then, in default of any provision to the contrary, supervening impossibility of the kind foreseen will, just like unforeseen impossibility, operate to discharge the promisor from his obligation. That is, the promise . . . is a simple and unqualified promise of performance . . . discharge is not so much effected by unforeseen impossibility as by impossibility for which the contract itself has made no provision.”<sup>9</sup>

Impossibility always discharges unless a warranty covering that contingency has been given.<sup>10</sup>

What is the effect of the discharge of A by impossibility upon the obligation of B, the other party to the contract? Mr. Wade

<sup>1</sup> 56 L.Q.R., at 525. See *The Constantine Case* [1942] A.C. 154, 184, 203. Lord Wright says: “I am not clear what ‘if he may’ means.” Lord Porter points out that the case was not one of impossibility and that the observations were *obiter*.

Mr. Wade (*ib.*, at 551) quotes *Hall v. Wright* (1859), E.B. & E. 746, 765, where performance, although dangerous, was not impossible.

<sup>2</sup> 56 L.Q.R., at 526.

<sup>3</sup> See *per* Bowen, L.J., in *Jacobs v. Crédit Lyonnais* (1884), 12 Q.B.D., at 603.

<sup>4</sup> 56 L.Q.R., at 529.

<sup>5</sup> *ib.*, at 532.

<sup>6</sup> *ib.*, at 531.

<sup>7</sup> *ib.*, at 534–8.

<sup>8</sup> *ib.*, 534, citing *Restatement of Contracts*, s. 2 (2).

<sup>9</sup> *ib.*, at 536, referring to the judgment of Goddard, J., in *The Tatem Case* [1939] 1 K.B. 132, 138, and contrasting *Walton Harvey, Ltd. v. Walker & Homfrays, Ltd.* [1931] 1 Ch. 274, which, he maintains, involved an alternative promise or warranty (56 L.Q.R. 534–6).

<sup>10</sup> *ib.*, at 538.

maintains that B is not discharged unless the contract provides, expressly or impliedly, that B's performance is conditional upon performance by A.<sup>1</sup> The *intention of the parties* is decisive; in the absence of intention, there was, "in the older English law," a "strict presumption" that *promises were independent and that performances were not conditions precedent to each other*.<sup>2</sup> *Pordage v. Cole* (1669), is cited, and Serjeant Williams' notes.<sup>3</sup> Promises are not interdependent unless conditions so provide.<sup>4</sup> Williston thinks that in a bilateral contract, not only are *promises* consideration for one another, but *the parties contemplate an exchange of performances*: failure of one party to perform should deprive him of the right to performance by the other party.<sup>5</sup> But this, Mr. Wade maintains, is not the law of England: "promises alone are the consideration for each other."<sup>6</sup>

#### (b) *A Criticism*

Mr. Wade's explanation of "if he may," in *Paradine v. Jane*,<sup>7</sup> is not convincing: "The reference to inevitable accident seems inconsistent with reading 'if he may' as reserving impossibility."<sup>8</sup> The theory of "alternative promises" is artificial. In the frustration cases, *Pordage v. Cole* has never been relied upon: the presumption that promises are independent, it is submitted, is no longer the law. Williston's view that the parties to a bilateral contract contemplate an *exchange of performances* seems reasonable and right: it is at the basis of *The Fibrosa Case*.<sup>9</sup> The English courts have decisively rejected the contention that upon impossibility, the other party may treat the contract as subsisting. *Impossibility* is but one category of

<sup>1</sup> 56 L.Q.R., at 539.

<sup>2</sup> *Ib.*, at 540.

<sup>3</sup> 1 Saunders, 7319; set out, 56 L.Q.R. 543-4. See also *ib.*, at 546, rule as set out by Anson.

<sup>4</sup> 56 L.Q.R. 542. See also *ib.*, at 546, citing *The Leiston Case* [1916] 2 K.B. 428, as an example of independence of promises for continuous delivery and payment by instalments. But this case is of doubtful authority: see *The Denny Mott Case* [1944] A.C. 265, 271, 280, *per* Viscount Simon, L.C., and Lord Wright.

<sup>5</sup> Cited at 56 L.Q.R. 547.

<sup>6</sup> *Ib.*, at 547. See *The Fibrosa Case* [1943] A.C. 32. In the formation of contract, the *promise* may often be the consideration: where failure of consideration is concerned, it is *performance* that has failed: *per* Viscount Simon, L.C. (at 48). Thus, also, Lord Wright: "The failure of consideration which justifies repayment is a failure in the contract performance" (at 72). Lord Atkin did not think that "consideration" should be used in two senses (at 53). Lord Russell of Killowen thought that delivery (i.e., performance) was the consideration (at 56).

And see upon Patterson, 42 Columbia L. Rev., 903-954, discussed *infra*, 440.

<sup>7</sup> (1647), Aleyn 26.

<sup>8</sup> *Per* Lord Wright in *The Constantine Case* [1942] A.C. 154, 184. See also Lord Wright's speech in *The Cricklewood Case* (1945), 61 T.L.R. 202, 206: "But so unqualified a statement would not be consistent with the modern law relative to the discharge of contractual obligations by impossibility of performance . . ." *Infra*, 577.

<sup>9</sup> See note 6, *supra*.



frustration: *any* vital change in the circumstances may defeat a contract.<sup>1</sup> The difficulties of fitting frustration into the older law will vanish if one concede, with Lord Wright, that it is "a substantive and particular rule which the common law has evolved."

## II. IN AMERICA

In a realistic analysis of the function of the court in cases of frustration, American jurists have gone much further than their English colleagues. Professor A. L. Corbin explains the judicial process as one, not of "interpretation," but of "construction" of the contract. Professor W. H. Page shows how the fiction of the "implied condition" is invoked to explain not the process, but *the result*. Professor Edwin W. Patterson examines the inarticulate reasons underlying "constructive conditions."

### 1. Professor A. L. Corbin

Professor Corbin frankly describes the function of the court in language similar to that which Lord Wright has used.<sup>2</sup>

"The court must supply the gap and allocate the risk in accordance with reason—that is, in accordance with custom, business practice, common feeling, the *mores* of the community."<sup>3</sup>

He continues:—

"The process is often inaccurately described as 'interpretation' of the contract: it is less misleading to describe it as the 'construction' of the contract, meaning thereby the determination by the court of the legal operation of the contract along with that of the facts that have occurred since its formation. The 'intention of the parties,' as objectively expressed, is indeed an important and frequently the decisive element: but an intelligent judge is aware that his function goes far beyond the ascertainment of such intention."

One is reminded of Lord Wright's speech in *The Denny Mott Case*.<sup>4</sup>

<sup>1</sup> Per Lord Wright in *The Constantine Case* [1942] A.C. 154, 183.

<sup>2</sup> Arthur L. Corbin, *Recent Developments in the Law of Contracts* (1937), 50 Harv. L. Rev. 449-475, at 464-466. A useful account of American criticism is given by R. Gottschalk, *Impossibility of Performance in Contract* (1938), 87-98.

<sup>3</sup> *Ib.*, at 465.

<sup>4</sup> [1944] A.C. 265, 274-5: "... the court decides the issue and decides it *ex post facto* on the actual circumstances of the case. The data for decision are, on the one hand, the terms and construction of the contract, read in the light of the then existing circumstances, and, on the other hand, the events that have occurred." See also Corbin, *Supervening Impossibility of Performing Conditions Precedent* (1922), 22 Columbia Law Review, 421-429, at 423, 424. "In my discussion," he says, "'condition' does not mean a group of words or the thought expressed by them. It is not a 'proviso' in a contract or a 'term' thereof. Instead, it is a *fact* the existence or future occurrence of which is uncertain, and in

## 2. Professor W. H. Page

Professor Page declared :—

“In cases of this sort the analogy of the implied condition is evidently a factor which is at best unnecessary and at worst misleading.”<sup>1</sup>

If the parties contemplated *and provided for* the contingency, the doctrine does not apply ; it is then for the court to ascertain the *intention* of the parties : *a true case of a condition*.

“Impossibility of performance exists only where there has been an unconditional promise to do a thing, and performance of such promise has been rendered impossible by some subsequent act or event which the parties had not anticipated.”

Where frustration arises, the court, in effect, *first* determines that, in the given circumstances, the contract is discharged, and *then* proceeds to read into the contract the implied condition.

“Unfortunately, the theory of the implied condition . . . has been adopted as a convenient explanation of the result which is actually reached in determination, whether the act or event in question amounts to impossibility or not. In these cases, however, the court is obliged to ascertain, in the first instance, whether the act or event amounts to an impossibility which discharges the contract before it is able to determine whether it is an implied condition or not. If the case is found to be one of impossibility, the fiction of the implied condition is then invoked to explain the result, while if the case is found not to be one of impossibility, it is said that the implied condition does not exist.”

## 3. Professor Edwin W. Patterson

Professor Patterson takes as his text a passage from Holmes :—

“You always can imply a condition in a contract. But why do you imply it ? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions.”<sup>2</sup>

Professor Patterson attempts “to articulate the reasons of policy or value,” underlying “implied conditions.” He adopts Corbin’s definition of “*condition*,” as a *fact* which may be an event or occurrence. The most important types of such

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the absence of which certain contemplated legal relations will not exist. It may be an *act* of the obligee or of another person, or it may be an event other than an act. To be a condition at all, however, it must be an operative or causal fact that will create new legal relations, or extinguish old ones, or both.”

<sup>1</sup> William Herbert Page, *The Development of the Doctrine of Impossibility of Performance* (1920), 18 Michigan Law Review, 589-614, at 599.

<sup>2</sup> Cited, *ib.*, at 903, from *The Path of the Law*, in *Collected Legal Papers*, 167, 181.

conditions are conditions of exchange, of co-operation, and of frustration. Imposed by law and "not wholly independent of the language of the contract," a constructive condition may be dispensed with by express agreement.

(a) *The condition of exchange* is a modern term for the condition based on "mutual dependency of promises." In *Pordage v. Cole* (1669),<sup>1</sup> it was held that if B has covenanted to pay A a sum of money for his land on a particular day, these words amounted to an independent covenant by A to convey, and A might sue for the money before the land was conveyed. B would have an independent action of covenant against A. Upon this case Sergeant Williams' *Notes*<sup>2</sup> had long been regarded as authoritative: where promises were *independent*, one party might sue the other without averring performance of his own promise, but where promises were *dependent*, the plaintiff must prove that he has performed his promise to entitle him to an action for breach of the defendant's promise. Whether a promise was dependent or independent, was a question of the "intention and meaning of the parties and the good sense of the case."<sup>3</sup>

Lord Mansfield, however, in Professor Patterson's view, in *Kingston v. Preston* (1773),<sup>4</sup> established "the general doctrine of mutual dependency of promises."<sup>5</sup> There were three kinds of covenants, said Lord Mansfield:—

(i) mutual and independent, where either party may sue the other, the plaintiff's breach being no excuse for the defendant;

(ii) conditions where "the performance of one depends on the prior performance of another": until then, the other party is not liable on his covenant;

(iii) "mutual conditions to be performed at the same time; and, in these, if one party was ready, and offered, to perform his part, and the other neglected, or refused, to perform his, he who was ready, and offered, has fulfilled his engagement, and may maintain an action for the default of the other; though it is not certain that either is obliged to do the first act."<sup>6</sup>

Whether a covenant is dependent or independent is "to be collected from the evident sense and meaning of the parties . . . their precedency must depend on the order of time in which the intent of the transaction requires their performance."<sup>7</sup>

*The Restatement* speaks of "*promises for an agreed exchange*."<sup>8</sup> The parties in *all* bilateral contracts expect not merely exchange

<sup>1</sup> 1 Saunders, 319 l: "and so each party has mutual remedy against the other."

<sup>2</sup> *Ib.*, 320 a-f.

<sup>3</sup> *Ib.*, 320 b.

<sup>4</sup> Cited in (1781), 2 Douglas 689-691.

<sup>5</sup> 42 Columbia L. Rev., at 908.

<sup>6</sup> (1781), 2 Douglas, at 690.

<sup>7</sup> *Ib.*, at 691.

<sup>8</sup> Section 266.

of promises but also exchange of performances : rarely in recent cases are bilateral promises independent :<sup>1</sup> "reciprocal dependency of promises has but few exceptions."<sup>2</sup> A principle of policy "favors the construction of concurrent conditions."<sup>3</sup>

(b) *Conditions of co-operation.*—"If the promise cannot be performed until the promisee has done something, then that act or omission is a condition of the promisor's duty; in other words, the promisor is required to co-operate with the promisee in the performance of his promise."<sup>4</sup> In modern law, a party is excused from performing a promise by the prevention or hindrance of the other party.<sup>5</sup> Thus, in *Mackay v. Dick*<sup>6</sup> the buyer of a machine was liable for the price, having refused to make a test of the machine, which was a condition precedent of his promise to pay.

A passage from Williston is cited as a "fair guide," needing "amplification" and "qualification." "It is a principle of fundamental justice that if a promisor is himself the cause of the failure of performance, either of an obligation due to him or of a condition on which his own liability depends, he cannot take advantage of his failure."<sup>7</sup>

This principle is qualified by an exception, "unless the risk of such prevention or hindrance is assumed by the other party."

Acts or omissions within the obligor's control, which are the normal means of the obligee's performance are required of the obligor.<sup>8</sup> "The usages of the trade or activity, the *mores* of the community" (among other factors) decisively determine what co-operation is required.<sup>9</sup>

(c) *Conditions of Frustration.*<sup>10</sup>—Professor Patterson discusses certain tests which have been propounded as a *rationale* of frustration. "What the parties would have done," involves the assumption that the parties would have acted as "reasonable men." Yet had they "*felt sure*" that the frustrating event

<sup>1</sup> 42 Columbia L. Rev., at 914.

<sup>2</sup> *Ib.*, at 915. True exceptions are said to be aleatory promises and bilateral contracts for the benefit of a third person, but, in the former, Professor Patterson does not think that the promises are "wholly independent."

<sup>3</sup> *Ib.*, at 917, citing Williston, s. 835, and *Restatement*, s. 267 (b) (c). *Morton v. Lamb* (1797), 7 T.R. 125.

<sup>4</sup> *Ib.*, at 929.

<sup>5</sup> *Ib.*, at 931, where older cases are cited.

<sup>6</sup> (1881), 6 A.C. 251, 263. Lord Blackburn said: "Where in a written contract it appears that both parties have agreed that something shall be done which cannot effectually be done unless both concur in doing it, the construction of the contract is such that each agrees to do all that is necessary to be done on his part for the carrying out of the thing." Professor Patterson also cites *The Valseria* [1927] P. 115.

<sup>7</sup> Section 677, cited *ib.*, at 937.

<sup>8</sup> *Ib.*, at 937, 938.

<sup>9</sup> *Ib.*, at 938.

<sup>10</sup> *Ib.*, 943-954.

would happen, they might not have made the contract at all, or they might have made "any one of a dozen possible compromises."<sup>1</sup> To say that *the parties* would have inserted the constructive condition, "is to conceal the evaluative judgment under a fictitious inference of fact."<sup>1</sup> Of the "contemplation" test, philosophers "contemplate," not business men making a bargain: they expect performance. *The test of assumption of risk*—"which party may justly be deemed to have assumed the risk of this supervening event?"—seems, to Professor Patterson, "meaningful."<sup>2</sup> Some types of case may be explained by *the control test*.<sup>3</sup> According to the "*Disturbed Balance Theory*":—

"A contract, fairly and voluntarily made, has in it an element of equality between two opposing considerations,—the goods, let us say, and the price. If the balance is violently disturbed, that is, if for some reason the execution of the contract by one party would confer no benefit on the other, or would impose enormous burdens on the party performing, then the state of impossibility as a matter of law is approached."<sup>4</sup>

"Unjust impoverishment" would explain other types of case.

Professor Patterson suggests no new or unified theory: "The decision of a litigated case is determined by considering various tests or principles, no one of which holds exclusive sway."<sup>5</sup>

The excuse of *Frustration of purpose* is "too well established" to be rejected as a temporary aberration."<sup>6</sup> "Failure of consideration"—meaning "failure of the promisee to perform (substantially) his counter-promise"—explains some decisions, but not cases where performance was not rendered "impossible by the frustrating event." Krell did not promise that the coronation would take place.<sup>7</sup>

"A dressmaker who agrees to make a wedding gown for a prospective bride does not lose his right to compensation because the intended bride dies before the wedding."<sup>8</sup>

The "basic assumption" test assumes that the contract has a common "basis" yet each party has a different object. Two limitations qualify the scope of the doctrine: the frustration

<sup>1</sup> *Ib.*, at 946. See also *per* Lord Wright in *The Denny Mott Case* [1944] A.C. 265, 275.

<sup>2</sup> *Ib.*, at 548, 549.

<sup>3</sup> *Ib.*, at 549.

<sup>4</sup> Cited *ib.*, at 949, from Blair, *Breach of Contract Due to War, Selected Readings, On the Law of Contracts*, New York (1931), 1015, 1017.

<sup>5</sup> *Ib.*, at 950.

<sup>6</sup> *Ib.*, at 951, citing Williston, s. 1954; *Restatement*, s. 288.

<sup>7</sup> *Krell v. Henry* [1903] 2 K.B. 740; but a theatrical producer who sells tickets for his play does promise that the performance will take place; in default he must refund the price of the ticket. (*Ib.*, at 951, *Note* 229.)

<sup>8</sup> *Ib.*, at 952.

must be due to an event "unanticipated and uncontrollable" by the promisor, and the performance promised by the promisee must become "almost or wholly worthless" by the event.<sup>1</sup>

"In so far as the excuse of frustration . . . relieves a promisor because of fortuitous frustrations of his purposes, it should be, and generally is, a safety valve which is moved only by the pressure of war and other catastrophic events."<sup>2</sup>

### III. IN CANADA

*Dr. Cecil A. Wright*

(a) Dr. Cecil A. Wright, K.C. (the learned editor of *The Canadian Bar Review*), in the course of his estimate of the *First Edition*, criticises the use, by the author, of the term "*quasi-contract*."<sup>3</sup> Like Professor Winfield,<sup>4</sup> he prefers that term to be reserved for situations in which the court seeks to remedy *unjust enrichment*, or orders "*restitution*." With this criticism the author respectfully agrees.

(b) Dr. Wright proceeds to make a *fundamental criticism* of the author's view of frustration. All the English cases, he justly observes, speak of frustration as terminating a "*contract*." But why, in *Krell v. Henry*<sup>5</sup>—he continues—why might not the hirer, if he had wished, even though the coronation was cancelled, have insisted on taking the room and paying for it? Impossibility may excuse a promisor from his duty to perform, but it does not follow that the rights of the other party are *automatically terminated*—"*a contract creates a relationship involving rights and duties*."<sup>6</sup>

Dr. Wright cites Doull, J., who tried *The Maritime Fish Case*<sup>7</sup> :—

"No doubt the man who hired the window to look at the coronation procession could still have insisted on paying his money and using the space. It is the fact that the circumstances which were the vital basis of the contract have changed which enables him to treat the contract as at an end."

(c) *The answer* may be summarised thus:—

*First* (as Dr. Wright himself declares), *all the English cases* assume termination of the contract. Lord Sumner speaks of "a common relief from the common disappointment and an immediate termination of the obligations as regards future performance."<sup>8</sup>

<sup>1</sup> *Ib.*, at 952. Yet the maker could recover for the wedding gown, as Professor Patterson points out. This limitation does not apply in English law.

<sup>2</sup> *Ib.*, at 954.

<sup>3</sup> (1941), 19 Can. Bar Rev. 224-227, at 225.

<sup>4</sup> *Supra*, 429.

<sup>5</sup> [1903] 2 K.B. 740, *infra*, 463.

<sup>6</sup> *Ib.*, at 226.

<sup>7</sup> [1934] 1 D.L.R. 627; [1935] A.C. 524, *infra*.

<sup>8</sup> *The Hirji Case* [1926] A.C. 497-507. See *infra*, 508.

And Lord Wright, in the most recent dicta, observes :—

"The common object of the parties is frustrated. The contract has perished. *quoad* any rights or liabilities subsequent to the change."<sup>1</sup>

"It is now, I think, well settled that where there is frustration, a dissolution of a contract occurs automatically."<sup>2</sup>

*Secondly*, apart from authority, surely, *in principle*, that view must be right. Of course, the hirer in *Krell v. Henry*, had he wished, might have paid £75 to sit for two days in a flat in Pall Mall, "not to see a procession, but only to meditate on the spectacle which he had missed."<sup>3</sup> But was that the purpose of his promise to pay £75? Having regard to the ways of mankind, could he be expected to do that? Suppose he *had* paid £75—in order to meditate. Would not that have been "the commercial or practical purpose" of the contract frustrated,<sup>4</sup>—a *new contract*? Frustration is catastrophic and operates *automatically*; the parties must know *instantly* where they stand:

"The contract binds or it does not bind," says Lord Sumner, "and the law ought to be that the parties can gather their fate then and there . . . That fate is dissolution or continuance and, if the charter ought to be held to be dissolved it cannot be revived without a new contract. The parties are free."<sup>5</sup>

And this, of Lord Wright :—

"But in the case of frustration, the contract is ended and dead, simply by the frustrating event. If the parties choose to go on with it, that is in truth entering into a new contract. . . . The position of the parties ought to be determined at once, and an indefinite suspense avoided."<sup>6</sup>

## D. WILLISTON: LAW OF CONTRACTS

An English lawyer, arguing in appellate tribunals (or even in a court of first instance), may turn with great reward to that "monumental" work—as Lord Wright has described it<sup>7</sup>—of *Professor Samuel Williston* (of Harvard) on the *Law of Contracts*. "The publication of the first edition in 1920<sup>8</sup> marked a stage

<sup>1</sup> *The Constantine Case* [1942] A.C. 154, 183. See also *per* Viscount Simon, L.C.: "It kills the contract itself and discharges both parties automatically."

<sup>2</sup> *The Denny Mott Case* [1944] A.C. 265, 274.

<sup>3</sup> 19 Can. Bar Rev. 227.

<sup>4</sup> *The Constantine Case* [1942] A.C. 154, 182, *per* Lord Wright.

<sup>5</sup> *The Bank Line Case* [1919] A.C. 435, 455.

<sup>6</sup> *The Constantine Case* [1942] A.C. 154, 188. See also *The Denny Mott Case* [1944] A.C. 265, 278, *per* Lord Wright.

<sup>7</sup> *Williston on Contracts* (1939), 51 L.Q.R. 189-221; *Legal Essays and Addresses*, 202-251.

<sup>8</sup> *The Law of Contracts*. In four volumes. New York. (1920). Vol. III (1926) contains ch. LIII, *Impossibility*, ss. 1931-1965.

in the history of the common law. This second and revised edition, the publication of which was completed in 1938, is another landmark.<sup>1</sup>

At the close of his great appraisal, Lord Wright declares :—

“ This is a great work, not only in size, but in amplitude of treatment, not only in learning, but in breadth and fair-mindedness of view . . . Williston on Contracts has already had a great part in the secular progression of our common law. This new edition will nobly continue the great work.”<sup>2</sup>

### 1. *Impossibility : Objective and Subjective*

Williston begins by pointing out that the defence of impossibility is modern<sup>3</sup> : “ it was not until after the middle of the nineteenth century that it was held that the destruction or non-existence of inanimate subject-matter to which a contract related would excuse a promisor from liability.”<sup>4</sup>

“ Under the name of implied contracts (quasi-contracts) courts have wisely imposed obligations on parties to contracts which they never agreed to assume ; and because of fraud, mistake, duress, impossibility and illegality and of constructive (implied) conditions have modified contracts or dispensed with their performance, simply because justice required it.”<sup>5</sup>

“ Objective ” impossibility must be distinguished from “ subjective.” The first is due to “ the nature of the thing to be done ” ; the second, “ to the capacity of the person who has undertaken to do it.” In personal contracts, the two kinds unite. A person is not excused from performing a contract because it is *subjectively* impossible—that is, impossible for *him*, because he is insolvent or short of cash, for instance, unless performance is also objectively impossible. Generally speaking, “ purely subjective impossibility is immaterial ” (unless there is a “ failure of the contemplated means of performance ”).<sup>6</sup>

### 2. *Excusable Impossibility : Classification*

Not every kind of impossibility will excuse a promisor. In *three classes* of cases, however, it is well settled that the promisor will be excused from performance “ unless he either expressly

<sup>1</sup> *A Treatise on the Law of Contracts*. Revised edition by the author and George J. Thompson. Eight volumes, 2,044 sections. The law has been collated with the *Restatement*. For *Impossibility*, see vol. VI, ch. lviii, ss. 1931-1978.

<sup>2</sup> 55 L.Q.R., at 220, 221.

From Williston's treatise, “ English practitioners and writers have much to learn,” says Prof. Winfield in his *Preface to Pollock on Contracts* (1942), 11th ed., iii.

<sup>3</sup> Wms. Saund. 421a, note (2), citing *Paradine v. Jane* (1647), Aleyn 26.

<sup>4</sup> *Taylor v. Caldwell* (1863), 3 B. & S. 826.

<sup>5</sup> Williston, s. 1931.

<sup>6</sup> *Ib.*, s. 1932 ; for the qualification, see s. 1951 (“ *Destruction of intangible means of performance.*”) : the *Blackburn Bobbin Case* [1918] 1 K.B. 540, 546, per McCordie, J. Compare the *Comptoir Case* [1920] 1 K.B. 868, 902, per Scrutton, L.J.



agreed in the contract to assume the risk of performance, whether possible or not, or the impossibility was due to his fault."<sup>1</sup> A *fourth* is a possible class "where impossibility is due to the failure of some means of performance, contemplated but not contracted for."<sup>2</sup> A *fifth* class does not fall within impossibility; performance is possible,

"but the whole value of the performance to one of the parties at least, and the basic reason recognised as such by both parties, for entering into the contract has been destroyed by a supervening and unforeseen event."<sup>3</sup>

This operates as a failure of consideration for the promisee, not literally, "but in substance, because the performance has lost its value." These are described as cases of "frustration."

The three classes of excusable impossibility are:—

- (i) Impossibility due to domestic law.
- (ii) Impossibility due to the death or illness of one whose personal performance was contractually required.
- (iii) Impossibility due to "fortuitous destruction or change in character of something to which the contract related or which, by the terms of the contract, was made a necessary means of performance."

Impossibility may excuse although it is not an act of God, for example, where caused by the voluntary or malicious act of a third person.

"All that is important is that the promisor himself shall be free from fault. On the other hand, impossibility due to act of God will not necessarily excuse, since there may be an agreed assumption of risk."<sup>4</sup>

### 3. *Impossibility as Implied or Constructive Condition*

The doctrine of impossibility is said to be based on the theory of the "implied condition." Such a condition, however, is "constructive," that is—

"based on other reasons than the expressions of the parties."<sup>5</sup>

<sup>1</sup> Williston, s. 1935.

<sup>2</sup> Williston refers to the classifications in Woodward, *Impossibility of Performance as an Excuse for Breach of Contract* (1901), 1 *Columbia L. Rev.*, 529-541, at 533, and *Note* thereon (1901), 15 *Harv. L. Rev.* 418. (*Selected Readings*, 961.)

<sup>3</sup> For example, the "Coronation Seat Cases."

<sup>4</sup> Williston, s. 1936. See also s. 1972A. See *infra*, 699, note 6.

<sup>5</sup> The 1939 Supplement to Williston cites the *Tatem Case* (*supra*). See *Restatement (infra)*, s. 253: "a constructive condition is a condition that is such because of a rule of law, and is not based on interpretation of a promise or agreement." And see *The Russkoe Case* (1922), 10 *Ll. L. Rep.* 214, 216, 217: *supra*, 416, 417.

Impossibility, it is further said, is no excuse for failure to perform an "absolute promise."<sup>1</sup> This used to be true,

"for constructive conditions evolved from the court's sense of justice are of modern creation."<sup>2</sup>

But when is a promise absolute? In an "absolute promise" there may be concealed an "implied condition"; and when is a condition implied? If the contract provides for the contingency, the provision applies; but where "impossibility" is pleaded as a defence, the *words* are absolute and generally no particular intention is "evinced or sought for" in surrounding circumstances. The fact is:—

"Any qualification of the promise is based on the unfairness or unreasonableness of giving it the absolute force which its words clearly state. In other words, because the court thinks it fair to qualify the promise, it does so, and quite rightly; but clearness of thought would be increased if it were plainly recognised that the qualification or defence is not based on any expression of intention by the parties."<sup>3</sup>

The "foundation" is the same as in the case of mistake; the two defences are "substantially identical in principle."<sup>4</sup>

"As the basis for the defence of mistake is the presumed assumption by the parties of some vital supposed fact, so the basis of the defence of impossibility is the *presumed mutual assumption when the contract is made that some fact essential to performance then exists, or that it will exist when the time for performance arrives.*"<sup>5</sup>

Generally, the only evidence is:

"that the court thinks a reasonable person, that is, the court itself, would not have contemplated taking the risk of the existence of the fact in question."

If there were really an *implied condition*, the burden of proof would be upon the promisee, so as to bring him within the conditional promise.

<sup>1</sup> This is true, if the risk of impossibility has been intentionally assumed; "but to interpret every promise that is absolute in terms as involving such an assumption is not in accord either with justice or with the law"; s. 1937, note 4.

See Lord Porter's distinction between contracts "absolute in their nature" and contracts "where the promisor is only obliged to perform if he can": *The Constantine Case* [1942] A.C. 154, 203-4.

<sup>2</sup> Compare the observations of Lord Wright: (1939), (Cmd. 6009, *supra*, 420.

<sup>3</sup> Williston, s. 1937: cf. *Legal Essays and Addresses*, xii, 379, 380, *supra*, 407.

<sup>4</sup> In *Bell v. Lever Bros., Ltd.* [1932] A.C. 161, 226, 227, Lord Atkin draws the same conclusion: "We therefore get a common standard for mutual mistake, and implied conditions whether as to existing or as to future facts. *Does the state of the new facts destroy the identity of the subject-matter as it was in the original state of facts?*" (author's italics).

But contrast Lord Wright's observation in *The Constantine Case* [1942] A.C. 154, 186, that "mistake . . . cannot be extended to cover supervening impossibility or frustration, which is a different juristic concept."

<sup>5</sup> Author's italics.

"but, in fact, the burden should be placed on the promisor to establish the defence of excusable impossibility; and such seems to be the law whether the promisor is sued on his promise, or, as plaintiff, seeks to recover on a *quantum meruit* for part performance."<sup>1</sup>

And again:—

"The only reason the court has for inferring that a supposed fact was at the basis of the contract is its sense of what is fair and just."<sup>2</sup>

Lord Wright and Williston are at one.<sup>3</sup>

#### 4. *Destruction of Specific Thing*

"Where the existence of a specific thing is necessary for the performance of a contract, the accidental destruction or non-existence of that thing excuses the promisor, unless he has assumed by his contract the risk of its existence."<sup>4</sup>

Where the destruction *precedes* the bargain, *mistake*, as well as impossibility, is involved; "the result is the same when the destruction is subsequent to the bargain," though impossibility alone is involved.

#### 5. *Destruction of Essential Specific Thing*

"Not only where a specific thing is itself to be sold or transferred, but wherever a contract requires for its performance the existence of a specific thing, the fortuitous destruction of that thing, or such impairment of it as makes it unavailable, excuses the promisor unless he has clearly assumed the risk of its continued existence."<sup>5</sup>

Thus, where a contract has been made to manufacture goods in a *particular* factory, upon the destruction of *that* factory the contract is discharged.

#### 6. *Change in Intangible Essentials to Performance*

"Fortuitous destruction of or change in the means or basis of performance *contracted for* excuses a promisor."<sup>6</sup>

<sup>1</sup> Williston, s. 1937. See *The Constantine Case* [1942] A.C. 154; where a frustrating event is proved, it is not for the party pleading frustration to establish that he was not negligent, but for the other party to prove that he *was* negligent. See the speech of Lord Russell of Killowen for the onus of proof in cases of frustration: *ib.*, 178. *Infra*, Chap. XIX, 525 *et seq.*

<sup>2</sup> Williston, s. 1937, note 9.

<sup>3</sup> 55 L.Q.R., at 218.

<sup>4</sup> Williston, s. 1946: *Taylor v. Caldwell* (1863), 3 B. & S. 826.

<sup>5</sup> Williston, s. 1948.

<sup>6</sup> *Id.*, s. 1951; author's italics. Williston cites, *inter alia*, *Scottish Navigation Co., Ltd. v. Souter* [1917] 1 K.B. 222, 237: where the performance of the "Baltic round" became indefinitely impossible, the charterparty was dissolved; also, *In re Anglo-Russian Merchant Traders & Bank* [1917] 2 K.B. 679, where the contract of sale was discharged when the seller, having used due diligence, was refused an export licence. In the 1939 Supplement, *Tatem, Ltd. v. Gamboa*, *supra*, is cited, with the comment: "The agreement depended for its performance on the civilised existence of a certain state of facts." A strike may affect the means of performance: s. 1951A. See *The Penelope* [1928] P. 180.

But "the mere fact that performance has become difficult or expensive will not of itself operate as an excuse."<sup>1</sup> Where a contract for manufactured goods may be satisfied by goods in *any* factory, the seller is not excused because his factory or machinery are destroyed. It is "essential for a defence that the means of performance shall have been *contracted for, not merely contemplated*."<sup>2</sup>

"There certainly can be no excuse unless *both parties* contemplate a particular means of performance and contract on the assumption of its existence. Where a promise is absolute in terms to furnish goods or services, the mere fact that the *promisor alone* contemplated a certain means of performance and had no other means will not excuse him from liability when this means is accidentally destroyed."<sup>3</sup>

Williston propounds a test to determine whether the contract *depends* on the continued existence of the contemplated *means of performance*. He rejects the test that where the event causing impossibility "might have been anticipated and guarded against in the contract," one who makes an absolute promise is unconditionally bound<sup>4</sup>: that test has descended from a time when "impossibility was more rarely an excuse." "Any kind of impossibility," he justly observes, "is more or less capable of anticipation": it is "a question of degree": "any circumstance whatever" may be "guarded against by the draftsman of the contract." In a contract for personal service, the contingency of illness or death is easily anticipated, yet, although the contingency has not been provided for, the promisor is excused. The test, however, with a slight change of wording, may be applied to *the failure of the contemplated means of performance*, thus:—

"If the event causing the impossibility in question . . . could not only have been anticipated but its occurrence could have been guarded against by the promisor (not the effect of it by a provision in the contract but the occurrence itself by preventing its happening), it is reasonable to assume that the promisor took the risk of the continued possibility of performance."<sup>5</sup>

#### 7. *Expected Value of Performance Fortuitously Destroyed*

The "Coronation Cases"<sup>6</sup> do not involve impossibility of performance, but *the fortuitous destruction of the value of the contract*.

<sup>1</sup> Williston, s. 1952. See *The Blackburn Bobbin Case* [1918] 1 K.B. 540, 547.

<sup>2</sup> *Ib.*, s. 1952; author's italics. See cases cited in s. 1952, note 7.

<sup>3</sup> *Ib.*, s. 1952; author's italics. See cases cited in notes 7 and 10. Thus, an advertising contract is not discharged because the merchant's stock is subsequently destroyed. See also *The Blackburn Bobbin Case* [1918] 2 K.B. 467, 469.

<sup>4</sup> *Baily v. De Crespigny* (1869), L.R. 4 Q.B. 180.

<sup>5</sup> Williston, s. 1953.

<sup>6</sup> See, in particular, *Krell v. Henry* [1903] 2 K.B. 740; *infra*, 467-472.

"A supervening circumstance excused performance of contracts though it did not make that performance (hiring and letting of seats) impossible or even difficult, but merely deprived it of the value (as giving a view of the coronation procession) which was obviously the sole inducement for entering into the contracts."<sup>1</sup>

Since the "Coronation Cases," the doctrine of frustration has been applied by the American courts "under a variety of circumstances" on the ground that "the facts involve a failure of consideration despite the possibility of literal performance."<sup>2</sup>

On the other hand, a promise will not be discharged, simply because the promised performance has lost value, unless the purpose which both parties had in mind is nearly or completely destroyed by the "supervening fortuitous circumstances."

### 8. *Temporary Impossibility*

"If the delay caused by impossibility is excusable and is of short duration, the promisor is still held bound by his promises, except to the extent of such delay."<sup>3</sup>

On the other hand, if the impossibility lasts for so long as "to go to the *essence* of the contract," then, and then only, temporary non-performance by A justifies B in rescinding the contract.<sup>4</sup>

### 9. *Impossibility of Uncertain Duration*

The contract may contain a provision *suspending* its operation upon the occurrence of delay or difficulty; nevertheless, if the supervening delay frustrates the common object of the parties, the contract may be dissolved.<sup>5</sup>

"Where postponement of the performance of mutual obligations would involve a substantial alteration of the contract, no such postponement can be allowed; the contract is wholly dissolved."<sup>6</sup>

### 10. *Impossibility due to Promisor's Fault*

"It is only fortuitous impossibility that excuses from liability . . . If, however, physical inability to perform a

<sup>1</sup> Williston, s. 1954.

<sup>2</sup> See *Restatement*, s. 288, *Frustration of the Object or Effect of the Contract*. Williston (note 14) cites a series of cases which arose in New York, out of contracts to advertise in a Program of International Yacht Races, to take place in September, 1914. The price was payable on publication. The program was on sale early in August; in the middle of August, the races were cancelled on account of the war. The price could not be recovered from those whose advertisements had been inserted: s. 1954.

<sup>3</sup> Williston, s. 1957; *Andrieu Millar & Co. v. Taylor & Co.* [1916] 1 K.B. 402. *Restatement*, s. 462.

<sup>4</sup> *Metropolitan Water Board v. Dick. Kerr & Co.* [1917] 2 K.B. 1, 24.

<sup>5</sup> Williston, s. 1958

<sup>6</sup> See *Geipel v. Smith* (1873), L.R. 7 Q.B. 404; *The Jenny Mott Case* [1944] A.C. 265; *infra*, 518 *et seq.*

contract was obvious to the promisor though unknown to the promisee at the time when the contract was made . . . liability for these consequences will not be excused. And the same thing is true of any kind of impossibility known to or foreseeable by the promisor, or caused by him, or which would not have occurred had the promisor originally proceeded with reasonable diligence with the performance of his promise."<sup>1</sup>

Thus, Lord Sumner pointed out :—

" The principle of frustration of an adventure assumes that the frustration arises without blame or fault on either side. Reliance cannot be placed on a self-induced frustration ; indeed, such conduct might give the other party the option to treat the contract as repudiated."<sup>2</sup>

Thus, also, Lord Wright :—

" The essence of frustration is that it should not be due to the act or election of the party . . . the appellants cannot rely on their own default to excuse them from liability under the contract."<sup>3</sup>

" Clearly a party to a contract who by his fault has caused the impossibility cannot take advantage of his own wrong. In such a case he has prevented performance in the substantial sense . . ."<sup>4</sup>

#### 11. *Difficulty of Performance Generally no Excuse*

" The fact that by supervening circumstances performance of a promise is made more difficult and expensive, or the counter-performance of less value than the parties anticipated when the contract was made, will *ordinarily* not excuse the promisor."<sup>5</sup>

" The true distinction," continues Williston, " is not between difficulty and impossibility . . . The important question is whether an unanticipated circumstance, the risk

<sup>1</sup> Williston, s. 1959, *Restatement*, s. 459. *Death or Illness* as a discharge of a contract, unless there is " contributory fault on the part of the person subject to the duty." See (1940), 56 T.L.R. 882, 883.

<sup>2</sup> *The Bark Lure Case* [1919] A.C. 435, 452 ; *infra*, 495, 496.

<sup>3</sup> *The Maritime Fish Case* [1935] A.C. 524, 530, 531. See *Note* (1936), 52 L.Q.R. 7, 8. See *infra*, 558, 559.

<sup>4</sup> *The Constantine Case* [1942] A.C. 154, 182. See also, *per* Viscount Simon, L.C., at 166, and *per* Lord Porter, at 205, and passage cited from Salmond and Winfield, *Contracts*, 313.

<sup>5</sup> Williston, s. 1963 (author's italics). *Restatement*, s. 467. *Unanticipated Difficulty*. See the *Blackburn Bobbin Case* [1918] 1 K.B. 540 ; *infra*, 545-548.

And see *Columbus Railway, Power & Light Co. v. City of Columbus, Ohio* [1919] 249 U.S. 399, 412, 414, *per* Day, J. In *Updike Grain Corporation v. Megan, Trustee* (1938), 305 U.S. 663 ; 94 F. 2d 551 (noted, *Restatement*, 1939, p. 301), it was held that : " A lease agreement for the rental of a grain elevator is not frustrated when the rates of railroad feeding the elevator are charged so that storage in it is no longer feasible and its operation is no longer profitable."

of which should not fairly be thrown upon the promisor, has made performance of the promise vitally different from what was reasonably to be expected."<sup>1</sup>

## E. RESTATEMENT BY AMERICAN LAW INSTITUTE

It is fitting to conclude this exposition of the doctrine of frustration of the adventure with some reference to the principles of *impossibility* found in the *Restatement of the Law of Contracts*,<sup>2</sup> adopted at Washington in 1932, by the American Law Institute.<sup>3</sup>

The law of *Contracts* was the first branch of the law to be restated. Not until after fourteen years was it completed. Williston himself was chosen by the Institute as *Reporter*, and among the nine members of his committee were A. L. Corbin (Special Adviser), W. H. Page and G. J. Thompson (who collaborated in the second edition of Williston's *magnum opus*). The *Restatement of Contracts* closely follows the classification in Williston's work.<sup>4</sup>

The *Restatements* are cited in the courts of the United States.<sup>5</sup>

<sup>1</sup> Yet in the *Blackburn Bobbin Case* the seller was not excused!

<sup>2</sup> *Restatement of the Law of Contracts*. As Adopted and Promulgated by the American Law Institute at Washington, D.C., 6th May, 1932. In two volumes, 1932. See vol. II, ch. 14, ss. 454-469, *Impossibility*. Each section is divided into three parts: Restatement, Comment, and Illustrations.

<sup>3</sup> The Institute was founded in 1923. The Council is selected from all branches of the legal profession in the United States, the majority of the members being judges and practising lawyers. The *Reporter* on each branch of the law to be restated is advised by law teachers, judges and lawyers. The preliminary draft, settled after discussions between the Reporter and his advisory group, is submitted to the Council. The Council, after examination and conference with the Reporter, sends the draft to the members of the Institute and to the Co-operating Committees of State Bar Associations. The final stage is the adoption and promulgation by the members of the Institute at the Annual Meeting held in Washington in May.

See W. Draper Lewis, *The American Law Institute* (with Addendum by Birkett, J.) (1943), Journ. Comp. Legis., vol. XXV, 25-30, for the procedure of Restatement by the group discussion of experts: "It has been said that the Institute's Restatement of the law is the greatest legal work ever undertaken since Justinian."

Sixteen volumes of the *Restatement* have been published: *Contracts* (vols. I, II; 1932); *Agency* (vols. I, II; 1933); *Torts* (vols. I-IV, 1934-1939; Prof. F. H. Bohlen, Reporter); *Conflict of Laws* (1935); *Trusts* (vols. I, II; 1935); *Property* (vols. I-III; 1936-1940); *Restitution* (1937); *Torts* (vol. III; 1938); *Torts* (vol. IV; 1939); *Security* (1941); *Judgments* (1942). The *Restatement* may be consulted at the Library of the Royal Courts of Justice.

For the technique of the *Restatement*, see Lord Wright, *Legal Essays and Addresses*, 34-65.

<sup>4</sup> See *Preface to the Second Edition*, 1938, vol. I. This edition contains a Table of References to the *Restatement*.

<sup>5</sup> See *The Restatement in the Courts*, Minnesota, 4th ed., 1939, which contains an interesting account of the functions and the work of the Institute, together with classified citations by the courts from the official volumes of the *Restatement*. And see *Supplement to 4th ed.* (1941), and *Second Supplement to 4th ed.* (1943).

### 1. *Impossibility Defined*

"Impossibility means not only strict impossibility but impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved."<sup>1</sup>

"Impossible," runs the comment, "must be given a practical rather than a scientifically exact meaning."

### 2. *Objective and Subjective*

"Impossibility of performing a promise that is not due to the nature of the performance, but wholly to the inability of the individual promisor, neither prevents the formation of a contract nor discharges a duty created by a contract."<sup>2</sup>

A significant illustration is the following: A contracts to deliver goods of a specified description to B, on a certain day, time being of the essence. While conveying the goods to B on that day, A is waylaid and robbed. Although it is impossible for him to obtain other similar goods on the agreed day, his duty is not discharged.

### 3. *Existing Impossibility*

"Except as stated in section 455, or where a contrary intention is manifested, a promise imposes no duty if performance is impossible, because of facts existing when the promise is made of which the promisor neither knows nor has reason to know."<sup>3</sup>

Thus, A promises to sell his horse Major to B. At the time of the bargain, the horse is dead, though neither party knows or has reason to know. The promise of neither creates a duty.

### 4. *Supervening Impossibility*

"Except as stated in section 455, where, after the formation of a contract, facts that a promisor had no reason to anticipate, and for the occurrence of which he is not in contributory fault, render performance of the promise impossible, the duty of the promisor is discharged, unless a contrary intention has been manifested, even though he has already committed a breach by anticipatory repudiation; but where such facts occur after the time when performance is due, they do not discharge a duty to make compensation for a breach of contract."<sup>4</sup>

<sup>1</sup> *Restatement*, s. 454; *Williston*, s. 1931.

<sup>2</sup> Section 455; *Williston*, s. 1932.

<sup>3</sup> Section 456; Gottschalk (at 101, 102) points out that in two respects this statement goes further than s. 6 of the Sale of Goods Act, 1893: *First*, the contract (in the specified circumstances) is void *only* if the seller had *no knowledge*. *Secondly*, the section refers to goods which have *perished*; the *Restatement* deals with *any promise* whose performance is impossible.

<sup>4</sup> Section 457; *Williston*, s. 1933. Section 458 deals with *Supervening Prohibition or Prevention by Law* (*Williston*, ss. 1938, 1939); s. 459, with *Death or Illness* (*Williston*, ss. 1940-1944).



### 5. *Non-existence or Injury of Specific Thing or Person*

"(1) Where the existence of a specific thing or person is, either by the terms of a bargain or in the contemplation of the parties, necessary for the performance of a promise in the bargain, a duty to perform the promise—

(a) never arises if at the time the bargain is made the existence of the thing or person within the time for seasonable performance is impossible, and

(b) is discharged if the thing or person subsequently is not in existence in time for seasonable performance, unless a contrary intention is manifested, or the contributory fault of the promisor causes the non-existence.

(2) Material deterioration of such a specific thing, or physical incapacity of such a specific person, as is within the rule stated in subsection (1), has the same effect as non-existence in preventing a promisor's duty from arising or in discharging it, except that if the other party remains ready and willing to render in full the agreed exchange for whatever performance remains possible, the promisor is under a duty to render such partial performance, unless the deterioration or injury would make performance by him materially more burdensome."<sup>1</sup>

### 6. *Non-existence of Essential Facts*

Upon the non-existence of essential facts other than things or specific persons, within the rule stated in s. 160, a duty to perform the promise—

(a) never arises, if, when the bargain is made, the existence of such facts within the time for seasonable performance is impossible; and

(b) "is discharged if such facts subsequently do not exist within the time for seasonable performance, unless a contrary intention is manifested or the contributing fault of the promisor causes the non-existence, or unless performance is possible with unsubstantial variations under the rule stated in section 163."<sup>2</sup>

Means of performance may be so *impaired* as to amount to non-existence.

### 7. *Temporary Impossibility*

"Temporary impossibility of such a character that if permanent it would discharge a promisor's entire contractual duty, has that operation if rendering performance after the impossibility ceases would impose a burden on the promisor substantially greater than would have been imposed on him

<sup>1</sup> Section 460; Williston, ss. 1946-1950; Gottschalk, 106, and see 107-111 for a criticism of the illustrations.

<sup>2</sup> Section 461; Williston, s. 1951. See *infra*, 455.

had there been no impossibility ; but otherwise such temporary impossibility suspends the duty of the promisor to render the performance promised only while the impossibility exists."<sup>1</sup>

### 8. *Partial Impossibility*

" Where impossibility of performing part of the performance promised by a party to a bargain is of such character that if related to the entire performance it would prevent the imposition of a duty or would discharge a duty that has arisen, and the remainder of the performance is not made materially more difficult or disadvantageous than it would have been if there had been no impossibility, the existence of duty is affected only as to that part ; and if performance of the whole contract is possible with only an unsubstantial variation, the promisor is under a duty to render performance with that variation."<sup>2</sup>

An "*unsubstantial variation*" is illustrated by the following example. A contracts to deliver milk to B during 1944. at No. 18 Bellevue Street. In January, No. 18 is destroyed by fire ; B leases No. 17. B must accept the milk *there*, and there must A deliver the milk.

### 9. *Impossibility of performing some but not all Bargains*

" (1) Where a promisor makes two or more bargains<sup>3</sup> and facts then exist or subsequently occur that on grounds of impossibility prevent the imposition of a duty to perform all the promises in their entirety, or that discharge a duty to do so that has arisen, but partial performance capable of rateable apportionment to the several bargains is possible, the promisor is under a duty to make such apportionment and is otherwise discharged, except as stated in subsection (2).

(2) The right to damages of a promisee in a bargain who has been given ground by the promisor at the time of its formation to believe that the promisor has neither already made other bargains nor will make later bargains limiting his

<sup>1</sup> Section 462: Williston, ss. 1957, 1958. See *Andrew Millar & Co., Ltd. v. Taylor & Co., Ltd.* [1916] 1 K.B. 402; *Metropolitan Water Board v. Dick, Kerr & Co.* [1917] 2 K.B. 1, 24, *per* Warrington, L.J.

<sup>2</sup> Section 463. See Williston, s. 1956, citing the opinion of Rodenbeck, J., in *Kinzer Const. Co. v. State*, 125 N.Y.S. 46, 55 (Ct. Cl.). "These terms are implied in the contract by force of the law itself, and not because the parties had them in mind." Williston adds: "Since the qualification of the literal terms of the promise is imposed by the law, on the principles of justice, not because of the expressed intention of the parties, the extent of the qualification depends merely on what is just."

<sup>3</sup> The word "bargain" is used in this chapter in the *Restatement* "to include situations where no duty, and therefore no contract, arises because of impossibility, but where were it not for the impossibility there would be a contract" (s. 456, *Comment b*).

possibility of performing all his promises, is not diminished by such other bargains."<sup>1</sup>

The following illustration is given. A, a coal merchant, contracts with B to sell him 200 tons of coal from the cargo of a *specified* barge. Later, A contracts with C and D to sell them similar amounts from the cargo of the *same* barge. The barge is wrecked; 150 tons of coal are saved. A must deliver 50 tons to *each* buyer.<sup>2</sup>

#### 10. *Apprehension of Impossibility*

"Where a promisor apprehends before or during the time for performance of a promise in a bargain that there will be such impossibility of performance as would discharge or suspend a duty under the promise or that performance will seriously jeopardise his own life or health or that of others, he is not liable unless a contrary intention is manifested or he is guilty of contributing fault, for failing to begin or to continue performance, while such apprehension exists, if the failure to begin or to continue performance is reasonable."<sup>3</sup>

The fact that *later* it appeared that no harm would have ensued does not alter the rule.<sup>4</sup> There must be a *reasonable* apprehension of *serious* harm.<sup>5</sup>

A is under contract to do work for B in a certain neighbourhood. Cholera breaks out, and A reasonably apprehends that if he works there he will catch the disease. A's duty is discharged. The result would be the same if the disease, competently diagnosed as cholera, was later proved to be neither serious nor contagious.<sup>6</sup> On the other hand, a nurse in a hospital for contagious diseases, from the nature of her employment, *assumes the risk* of smallpox.<sup>7</sup>

"A promisor who fails to begin or to continue performance because of such ground for apprehension as justifies him in so doing under the rule stated in section 465 is entirely free from any duty to perform where the ground for apprehension continues until performance of the promise or of any remainder of it would impose upon him a seriously greater burden than he would have been subjected to had there been no ground for apprehension, either because he has materially changed his position in reasonable reliance on the apprehension or because the situation is altered in other ways."<sup>8</sup>

<sup>1</sup> Section 464: Williston, s. 1962.

<sup>2</sup> See *Tennants (Lancashire), Ltd. v. C. S. Wilson & Co., Ltd.* [1917] A.C. 495, 512, *per* Viscount Haldane: "They were either bound to all their customers equally or they were not bound to any of them", *supra*, 400-402.

<sup>3</sup> Section 465 (1). Subsection (2) states the matters to be considered in determining whether the failure to begin or to continue performance is reasonable.

<sup>4</sup> *Comment (b).*

<sup>5</sup> *Comment (c).*

<sup>6</sup> *Illustration 1.*

<sup>7</sup> *Illustration 4.*

<sup>8</sup> Section 466. See McElroy and Williams, *op. cit.*, 18, 19.

A contracts to work in B's factory for the ensuing year, for a daily wage, payable for days of work only. The factory is closed owing to a *general strike* which B cannot prevent or terminate. The strike, *apparently*, will last a long time. A goes to work for C. The strike unexpectedly ends. A is discharged from his duty to B.<sup>1</sup>

Apart from the exceptions already discussed, *unanticipated difficulty or expense* in performance, "do not prevent a duty from arising or discharge a duty that has arisen."<sup>2</sup>

### 11. Frustration of Object or Effect of the Contract

"Where the assumed possibility of a *desired object or effect* to be attained by either party to a contract forms *the basis on which both parties enter into it*, and this object or effect is or surely will be frustrated, a *promisor* who is without fault in causing the frustration, and who is harmed thereby, is *discharged* from the duty of performing his promise *unless a contrary intention appears*."<sup>3</sup>

This is the principle of the "*Coronation Cases*," but is stated under the heading not of "Impossibility," but of "*Constructive Conditions and Failure of Consideration in Promises for an Agreed Exchange*."

The object or effect must be *the basis of the contract in the mind of both parties*. The rule is applicable though literal performance is still possible; but the *risk* of the contingency may be *assumed* in terms, or on a fair interpretation of a contract.<sup>4</sup>

#### <sup>1</sup> Illustration 2.

<sup>2</sup> Section 407; Williston, s. 1963; for example, an earthquake destroying the foundation of a building to be erected; delay, through unprecedented rains, in completing a building; increase of tariff on raw materials, increasing cost of manufacture. See the *Blackburn Bobbin Case* [1918] 1 K.B. 540, 546, *per* McCordie, J.; the *Comptoir Case* [1920] 1 K.B. 868, 902, *per* Scrutton, L.J.

<sup>3</sup> Author's italics. *Restatement*, s. 288 in vol. I. ch. 10, *Conditions*, Topic 3, *Constructive Conditions*. A "constructive condition" for the purposes of that chapter, "is a condition that is such because of a rule of law, and is not based on interpretation of a promise or agreement" (s. 253).

<sup>4</sup> See *Comment* on the section. The *Illustrations* cite a "*Coronation Seat Case*" and the case of the advertisement in the souvenir program of the International Yacht Race cancelled owing to the War of 1914.

For a succinct *English Restatement of Supervening Impossibility*, see *A Digest of English Civil Law*, by Edward Jenks (1938), 3rd ed., I, 131, 132.

## CHAPTER XVII

### JUDICIAL BASES OF FRUSTRATION<sup>1</sup>

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#### 1. RULE IN *PARADINE v. JANE*

“WHEN the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his Contract. And therefore, if the Lessee covenant to repair a House, though it be burnt by lightning, or thrown down by Enemies, yet he ought to repair it.”<sup>2</sup>

Despite the invasion of the realm by Prince Rupert who had expelled the tenant from his house, the three years' rent in arrear must be paid. The tenant had *demurred* saying, not that the lease had ended, but that, for a part period, he was not liable, *in debt, for rent*.

<sup>1</sup> Professor Winfield, in his review of the *First Edition* (1941), 50 L.Q.R. 142, suggested a better title, “*Chief Varieties of Frustration*.” The author's intention was to trace, since *Taylor v. Caldwell*, in 1863, the evolution of the doctrine of frustration—a (comparatively) modern judicial doctrine; *infra*, 459.

<sup>2</sup> (1647), *Aleyn* 26, 27. See Holdsworth, *A History of English Law*, VIII, 63: “The mere fact that a promise is impossible in fact is no ground of invalidity, if an unconditional promise has been made.” The rule in *Paradine v. Jane* is “still the law if the contract is in terms unconditional” (p. 64). The numerous exceptions have “to a large extent, eaten up the original rule. The original rule is now only applicable in cases where the parties have used words which show that they intended their promises to be absolute.” See Gottschalk 1-18, 26-28.

On *Paradine v. Jane*, Pollock observed: “Neither the date of the decision nor the reporter's standing (see Wallace on the Reporters) can be said to recommend it, but it is typical of the views then current and has been uniformly followed” (11th ed., 231, note 20).

See Williston, *ss.* 944-946.

See *per* Lord Buckmaster in *Matthey v. Curling* [1922] 2 A.C. 180, 227.

*Paradine v. Jane* was followed by Darling, J., in *Redmond v. Dainton* [1920] 2 K.B. 256, 259, where the demised house was struck by an enemy bomb during the currency of the lease and was damaged. The lessee, under covenant to repair, was liable.

The exact meaning of the words "if he may" is not clear. They may mean "if he legally may," but they can hardly reserve impossibility.

"But the results of holding a man to the absolute terms of a contract would often be so unjust that, from early times, as Blackburn, J.'s examples in *Taylor v. Caldwell* show, the courts set themselves to avoid these results wherever justice seemed to require it."<sup>1</sup>

Both Lord Wright and Lord Porter have pointed out that the dictum in *Paradine v. Jane*,<sup>2</sup> was *obiter*, and that the case was not one of impossibility.<sup>3</sup>

Until eighty years ago the rule flourished in full vigour, but "so unqualified a statement," said Lord Wright, "would not be consistent with the modern law relative to the discharge of contractual obligations by impossibility of performance . . ."<sup>4</sup>

## 2. NON-EXISTENCE OF SUBJECT-MATTER

"Where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burdensome or even impossible . . . But this rule is only applicable where the contract is positive and absolute; and not subject to any condition either express or implied; and *there are authorities which, as we think, establish the principle* that where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, *the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor*": *Taylor v. Caldwell*.<sup>5</sup>

<sup>1</sup> Per Lord Wright in *The Constantine Case* [1942] A.C. 154, 184.

<sup>2</sup> See note 2, *supra*, p. 458.

<sup>3</sup> [1942] A.C. 154, 184, and at 203. See Wade, 56 L.Q.R. 525, *supra*, 435.

<sup>4</sup> In *The Cricklewood Case* (1945), 61 T.L.R. 202, 206. See *ib.*, for effect of *Paradine v. Jane*, *infra*, 577.

<sup>5</sup> (1863), 3 B. & S. 826, 833, 834, per Blackburn, J.: author's italics. At p. 340, in the last paragraph of his judgment, Blackburn, J., says:—

"the Music Hall having ceased to exist, without fault of either party, both parties are excused."

This is the more correct statement of the rule. See, per Lord Wright, in *The*

Caldwell agreed to let Taylor have the *use* of the Surrey Gardens and Music Hall on four specified days for the purpose of giving four grand concerts and day and night fêtes; Taylor agreed to take the gardens and hall on those days and to pay £100 for each day, "God's will permitting." The existence of the music hall in a state fit for a concert was essential for the fulfilment of the contract; without it the entertainment contemplated could not be given. Before the first day on which a concert was to be given, the hall was destroyed by fire, without the fault of either party; the concerts could not be given. The possibility of such a disaster was not present to the minds of the parties when framing their agreement.

The question had been raised whether the hall was *demised* or not, but Blackburn, J., observed:—

"Nothing, however, in our opinion, turns on this."<sup>1</sup>

Blackburn, J., said that, "looking at the whole contract . . . the parties contracted on the basis of the continued existence of the Music Hall at the time when the concerts were to be given; that being essential to their performance."<sup>2</sup>

"The music hall having ceased to exist, without fault of either party, *both parties are excused*, the plaintiffs from taking the gardens and paying the money, the defendants from performing their promise to give the use of the hall and gardens and other things."<sup>3</sup>

The learned judge, citing the Digest, declared that the principle of the implied condition applies, in Roman law, to every obliga-

*Constantine Case* [1942] A.C. 154, 182. See also, *per* Viscount Maugham (at 168).

There is no distinction in principle where *part* of the specific thing perishes. Thus, in *Howell v. Coupland* (1874), L.R. 9 Q.B. 462, there was a contract for 200 tons of *regent* potatoes to be sown on 68 acres of specific land. Potato blight occurred; the crop failed and the defendant could deliver 80 tons only. The defendant was excused. Blackburn, J., restates (at 466) the ruling in *Taylor v. Caldwell*. "If from the nature of things the thing to be delivered is liable to perish then there is an implied condition that, if the delivery becomes impossible owing to the thing perishing without default of the seller he is excused; and the same principle must apply when the contract is only for a portion of a specific thing." The decision was affirmed by the Court of Appeal: (1876), 1 Q.B.D. 258, 263. Cleasby, B., put the point with terse clarity: "Here there was not an absolute contract to deliver 200 tons of potatoes . . . but 200 tons of potatoes grown on particular land . . . The crop on this particular land has failed, and there is nothing to which the promise can apply."

*Howell v. Coupland* was followed in *Nickoll & Knight v. Ashton, Edridge & Co.* [1901] 2 K.B. 126, 133, 134, where the ship upon which the goods were to be carried, was so damaged that it ceased to exist as a "cargo-carrying ship."

See *D/S A/S Gulnecs v. Imperial Chemical Industries, Ltd.* (1938), 1 All E.R. 24, 26, 27, where Goddard, J., applied the rule in *Taylor v. Caldwell* to a chartered ship, struck by a bomb and damaged beyond repair.

<sup>1</sup> (1863), B. & S., at 832. See *The Cricklewood Case* (1915), 61 T.L.R. 202, 204, *per* Viscount Simon, L.C., *infra*, 375.

<sup>2</sup> (1863), 3 B. & S., at 839.

<sup>3</sup> *Ib.*, at 840. (Author's italics.) *Taylor v. Caldwell* was followed in *Appleby v. Myers* (1867), L.R. 2 C.P. 651—where the contract was for work, labour and

tion of which the subject is a "certain thing" (*obligatio de certo corpore*).<sup>1</sup> Pothier, too, holds that "the debtor *corporis certi* is freed from his obligation when the thing has perished, neither by his act, nor his neglect, and before he is in default, unless by some stipulation he has taken on himself the risk of the particular misfortune which has occurred."<sup>2</sup>

With *Taylor v. Caldwell*, the "modern doctrine" of frustration may be said to begin.<sup>3</sup>

materials. The plaintiffs contracted to erect machinery on the defendant's premises and to keep it in repair for two years, the price to be paid on completion. Before the work was finished, the premises and their contents were destroyed by an accidental fire. Both parties were excused from further performance, but the plaintiffs could not recover the cost of the partly completed work. Blackburn, J., said: "Where . . . the premises are destroyed without fault on either side, it is a misfortune equally affecting both parties, excusing both from further performance of the contract, but giving a cause of action to neither" (at 659). Further, on the principles in *Cutter v. Powell* (1795), 6 Term Rep. 320; 2 Sm. L.C. 1: "The plaintiffs, having contracted to do an entire work for a specific sum, can recover nothing unless the work be done or it can be shown that it was the defendant's fault that the work was incomplete, or that there is something to justify the conclusion that the parties have entered into a fresh contract" (L.R. 2 C.P., at 661).

On the other hand, see *New System Private Telephones (London), Ltd. v. Edwards, Hughes & Co.* (1939), 55 T.L.R. 917. There the plaintiffs let on hire for fourteen years an internal telephone installation for the defendants' premises. By the contract, the defendants were entitled to have the installation transferred by the plaintiffs to other premises at the defendants' expense. The defendants' premises, with the installation, were destroyed by accidental fire, and the defendants contended that the contract had come to an end. Singleton, J., declined to hold that the parties contracted on the basis of the continued existence of the premises, or that there was a failure of something at the basis of the contract in the mind and intention of the contracting parties.

<sup>1</sup> Lib. XLV, tit. 1, *de verborum obligationibus*, l. 33: "*Si Stichus certo die dari promissus, ante diem moriatur: non tenetur promissor*" (cited in 3 B. & S., at 834).

Professor W. W. Buckland has shown that Blackburn, J., cited the *stricti juris* texts which had nothing to do with the bilateral *bonae fidei* contract of hire. Moreover, "Pothier's *certain corpus* is not the Roman *certum*. The contract of sale did not, in the Roman Law, create an obligation for a *certum*. The court failed to note that, on such facts, the buyer was not released . . . the court's decision that both parties in *Taylor v. Caldwell* were released, is a little surprising, even though just in itself and consistent with the court's earlier reasoning . . . In Roman law, there was no question of an implied agreement deducible from the circumstances; *casus*, rendering performance impossible, released the party whose performance was impossible, and entitled the other, on grounds of *bona fides*, to recover anything he had paid for the performance which had become impossible": *Causas and Frustration in Roman and Common Law* (1932), 46 Harv. L. Rev. 1281-1300 (at 1288). See *Kiell v. Henry* [1903] 2 K.B. 740, 748, 749.

See Buckland and McNair, *Roman Law and Common Law* (1936), 178-184.

<sup>2</sup> *Traité des Obligations*, partie 3, ch. 6, art. 3, s. 668 (cited, 3 B. & S., 834, 835).

<sup>3</sup> *Per* Lord Porter, in *The Constantine Case* [1942] A.C. 145, 198. But see criticism of Blackburn, J.'s judgment by Falconbridge in (1942), 20 Can. Bar Rev. 269: "Blackburn, J.'s language obscured the fact that the plaintiff was excused from the performance of his promise not by impossibility of performance but by failure of consideration."

See also Buckland's criticism in 46 Harv. L. Rev. 1288: the court's decision releasing both parties was "a little surprising." *Supra*, note 1.



## 3. ILLNESS OR DEATH

Blackburn, J., proceeds to refer to *contracts of personal service*,<sup>1</sup> which are "never in practice qualified by an express exception of the death of the party: and therefore in such cases the contract is in terms broken if the promisor dies before fulfilment. Yet it was very early determined that, if the performance is personal, the executors are not liable."<sup>2</sup>

"From the nature of the contract there is an implied condition of the continued existence of the life of the contractor, and, perhaps in the case of the painter of his eyesight."<sup>3</sup>

Thus, if, during a deed of apprenticeship, the apprentice dies, no action lies against the father for breach of covenant, but he is excused because of the apprentice's death.<sup>3</sup>

"The principle seems to us to be that, in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance."<sup>4</sup>

<sup>1</sup> (1863), 3 B. & S., at 835. Thus, a painter, employed to paint a picture, who is struck blind, will be excused from performance: a case put by Crompton, J., in *Hall v. Wright* (1858), El. Bl. & El. 746, 749. See the cases put by Pollock, C.B., *ib.*, at 793, 794. The plaintiff sued her fiancé for damages for breach of promise. The defence was that he had contracted a dangerous disease. In the court below, the plaintiff succeeded; on appeal, the court being equally divided, judgment was affirmed. Willes, J., said that the contract was unconditional. Martin B., thought it better to adhere to the rule in *Paradine v. Jane* than to create "an arbitrary exception" which would "utterly destroy the certainty of the law." The decision is opposed to American authority: Williston, s. 1943, *Restatement*, s. 459.

<sup>2</sup> *Hyde v. Dean of Windsor* (1597), Cro. Eliz. 552, 553. See Salmond and Winfield, 304, 305; Williston, s. 1940, *Impossibility Due to Death or Illness*, who states that "the well-founded fear of either also serves as an excuse, for the law will not compel a man to venture his life, unless the risk of the danger must be regarded as assumed by the nature of the employment as, for example, nursing in a hospital for contagious diseases, or by the express terms of the contract." Williston cites a case where an epidemic of infantile paralysis excused a contract to hold a baby show; and another case where a promise to work was excused by an epidemic of cholera.

See *Restatement*, s. 465, *When Apprehension of Impossibility excuses Beginning or Continuing Performance*, stating the criterion for reasonable apprehension that performance will "seriously jeopardise his own life or health or that of others." See s. 460, *When Apprehension of Impossibility Effects a Discharge*. The rule applies even though the well-grounded apprehension later ceases to exist.

<sup>3</sup> 3 B. & S., at 836. See also, *per* Lord Wright, in *The Denny Mott Case* [1944] A.C. 265, 274: "The rule [sc. of frustration] finds its simplest and earliest exemplification where a contract for personal service is frustrated by the death of the contractor during the period of covenanted service. For breaches of contract before his death, his representatives may be held liable, but no one has ever heard of them being held liable in damages for the dead man's failure to perform his contract as from the date of his death."

<sup>4</sup> *Ib.*, at 839.

In these cases, the promise is normally *positive*, nor is there stipulation of excuse upon destruction of the person or thing ;<sup>1</sup> "but that excuse is by law implied, because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel."<sup>2</sup>

This principle has been extended to the case of inability owing to *illness*, to perform a contract of personal service.

Thus, where an eminent pianist was unable, owing to illness, to appear at a particular concert, she was excused from performance : *Robinson v. Davison*.<sup>2</sup>

"The whole contract between the parties was based upon the assumption by both that the performer would continue living, and in sufficient health to play on the day named. This was really the *very foundation* of the promise, and *where the foundation fails the promise built on it must fail also*."<sup>3</sup>

Bramwell, R., said that this was a contract to perform a service which no deputy and no executor could perform :

"and I am of opinion that by virtue of the terms of the original bargain incapacity either of body or mind in the performer, without default on his or her part, is an excuse for non-performance."<sup>4</sup>

The contract, was conditional, not absolute.<sup>5</sup>

Kelly, C.B. approved the principle of the "implied condition." He cited Pollock, C.B., in *Hall v. Wright* :—

"All contracts for personal services which can be performed only during the lifetime of the party contracting, are subject to the implied condition that he shall be alive to perform them, and should he die, his executor is not liable to an action for the breach of contract occasioned by his death. So a contract by an author to write a book, or by a painter to paint a picture within a reasonable time would . . . be deemed subject to the condition that, if the author became insane, or the painter paralytic, and so incapable of performing the contract by the act of God,<sup>6</sup> he would not be liable

<sup>1</sup> 3 B. & S., at 839.

<sup>2</sup> (1871), L.R. 6 Ex. 269.

*Per* Cleasby, B. (at 278). This expression—"the failure of 'the foundation'"—Viscount Haldane used in the *Tamplin Case* [1916] 2 A.C. 397, 406, 407.

See *Pollock on Contracts* (11th ed., 242, 243), who points out that the contract became, not voidable at the option of the party disabled, but *wholly void*.

<sup>4</sup> *Per* Bramwell, B., at L.R. 6 Ex. 277 ; cited with approval by Lord Porter in *The Constantine Case* [1942] A.C. 154, 200.

<sup>5</sup> L.R. 6 Ex. 278.

<sup>6</sup> Upon "Act of God," see Williston, s. 1936 : *Excusable impossibility not necessarily act of God*. "On the one hand, impossibility may excuse though not due to act of God . . . The effect of the destruction of the subject-matter of the contract or of the means of performance is the same when caused by the voluntary

personally in damages any more than his executors would be if he had been prevented by death."<sup>1</sup>

Whether a plea of personal incapacity would fail, if it were due to *want of care*, has not yet been decided. "The ambit of 'default' " disabling the plea of frustration has not yet been "precisely and finally determined " observed Viscount Simon, L.C., in *The Constantine Case*.

"a man cannot ask to be excused by reason of frustration if he has purposely so acted as to bring it about."<sup>2</sup>

"Default " is a much wider term.

"Some day it may have to be finally determined,"

—the Lord Chancellor continues—

"whether a prima donna is excused by complete loss of voice from an executory contract to sing if it is proved that her condition was caused by her carelessness in not changing her wet clothes after being out in the rain. The implied term in such a case may turn out to be that the fact of supervening physical incapacity dissolved the contract without inquiring further into its cause, provided of course, that it has not been deliberately induced in order to get out of the engagement."<sup>2</sup>

Lord Porter inclined to the view that a contract of personal service is not an "absolute " contract, but a contract where the promisor is "only obliged to perform if he can." When he dies, he cannot perform his promise, and, "unless he be in fault," is excused.<sup>3</sup>

"The true principle seems to be," he says "not that all contracts must *prima facie* be performed whether performance be possible or not, but that there are some contracts absolute in their nature where the promisor warrants the possibility of performance. These he is bound to perform in any event or to pay damages, but there are other cases where the promisor is only obliged to perform if he can."<sup>3</sup>

This, with respect, is a new principle, and would, indeed, undermine "the sanctity of contract."

or malicious act of a third person as when caused by act of God. All that is important is that the promisor himself shall be free from fault. On the other hand, impossibility due to act of God will not necessarily excuse, since there may be an agreed assumption of risk." See also, *The Restatement*, s. 457.

<sup>1</sup> (1858), El. Bl. & El. 746, 793, 794; cited in (1871), L.R. 6 Ex., at p. 274.

See also *Graves v. Cohen and Others* (1930), 46 T.L.R. 121, 123, 124, where Wright, J., held that a contract by a jockey to ride the horses of an owner was dissolved by the death of either party.

<sup>2</sup> [1942] A.C. 154, 166, 167. See at 179, *per* Lord Russell of Killowen.

See *Poussard v. Spiers & Pond* (1876), 1 Q.B.D. 410, 414, 415, *per* Blackburn, J. Where a prima donna was unable through sickness to attend final rehearsals or the first performances, this failure "went to the root of the matter " and entitled the defendants to engage a substitute, permanently and at higher pay.

<sup>3</sup> *Ib.*, at 203, 204. See McElroy and Williams, *op. cit.*, 6, 7.

## 4. ILLEGALITY OF PERFORMANCE

Where, *by a change of English or foreign law*<sup>1</sup> (where foreign law governs the performance of the contract), *“further performance becomes illegal*, the promisor is discharged from performing his promise.

The defendant, in 1840, leased certain premises to the plaintiff for eighty-nine years and covenanted that *neither he nor his assigns* would permit any buildings to be erected on a paddock in front of the premises. Having assigned the paddock to a railway company, he did permit a railway station to be built. He pleaded that the company had acquired the paddock under statutory powers; an Act of Parliament had put it out of his power to perform his covenant. He was held discharged from liability: “*lex non cogit ad impossibilia*”. *Baily v. De Crespigny*.

Hannen, J., after stating that “a man may by an absolute contract bind himself to perform things which subsequently become impossible . . . where the event was or might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor,” proceeds<sup>3</sup>.—

“But where the event is of such a character *that it cannot reasonably be supposed to have been in the contemplation of the contracting parties* when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens. It is on this principle that the act of God is in some cases said to excuse the breach of a contract. This is in fact an inaccurate expression, because, where it is an answer to a complaint of an alleged breach of contract that the thing done or left undone was so by act of God, what is meant is that it was not within the contract; for, as is observed by Maule, J., in

<sup>1</sup> *Baily v. De Crespigny* (1869), L.R. 4 Q.B. 180. The maxim is found in Co. Litt. 231b; Broom, 162-169. See Williston, s. 1938, *Impossibility due to Change of Law*. See *Restatement*, s. 458.

See Lord Wright's observations on Hannen, J.'s judgment: *The Cricklewood Case* (1945), 61 T.L.R. 207. If the lessee had been sued for breach of covenant, he would equally have been discharged. On this, Lord Wright says: “This comes very near to the idea of frustration, at least if the performance of the covenant is fundamental to the lease and so do the words of Hannen, J., which Lord Buckmaster” [in *Matthey v. Curling* [1922] 2 A.C. 180] “quoted with approval . . .”

<sup>2</sup> *Ralli Brothers v. Compania Naviera Sota y Aznar* [1920] 2 K.B. 287. Where, by the law of Spain, the payment of freight above 875 pesetas per ton was illegal, that part of the contract requiring such payment was invalid. See *per Warrington, L.J.* (at 296). And see the judgment of Scrutton, L.J. (at 298-304).

And see *Perry v. Equitable Life Assurance Society of U.S.A.* (1929), 45 T.L.R. 468, 473, upon the annulment of a contract by the effect of a Russian decree.

<sup>3</sup> (1869), L.R. 4 Q.B., at 185.

*Canham v. Barry*,<sup>1</sup> a man might by apt words bind himself that it shall rain to-morrow or that he will pay damages."

But to hold a man liable to words "in a sense affixed to them by legislation subsequent to the contract," is

"to impose on him a contract he never made."<sup>2</sup>

Thus, in *Brewster v. Kitchel* it was held by Holt, C.J. :—

"Where the question is, Whether a covenant be repealed by Act of Parliament? This is the difference, viz.: where H covenants not to do an act or thing which was lawful to do, and an Act of Parliament comes after and compels him to do it, the statute repeals the covenant :

So, if H covenants to do a thing which is lawful, and an Act of Parliament comes in and hinders him from doing it, the covenant is repealed."<sup>3</sup>

In the present case the Legislature created a new kind of "assigns," un contemplated by the parties :—

"To hold the defendant responsible for the acts of such an assignee is to make an entirely new contract for the parties."<sup>4</sup>

The principle is equally applicable where "a lawful act of State" renders performance of a contract impossible.<sup>5</sup>

<sup>1</sup> (1855), 15 C.B., 597, 619 : "A man may, no doubt, for a good consideration contract to do that which he cannot be sure that he will be able to do ; a man may, if he chooses, covenant that it shall rain to-morrow."

See Williston, s. 1934 : "One who warrants that a horse is sound or that a ship has already arrived at a certain port, is promising something impossible if the horse is unsound or the ship has not arrived ; and though a warranty in effect is a promise to pay damages if the facts are not as warranted, in terms it is an undertaking that the facts exist." And (subject to the qualification there stated) "there seems no greater difficulty in warranting the legal possibility of a performance than its possibility in fact . . ." See *The Restatement*, s. 456, *Comment c* : "Parties may bind themselves by contract to perform what is in fact impossible." See Williston, s. 1972A, *Effect of Assumption of Risk of Impossibility*, *infra*, 699.

<sup>2</sup> (1869), L.R. 4 Q.B., at 186.

<sup>3</sup> (1698), 1 Salk. 197, 198.

<sup>4</sup> (1869), L.R. 4 Q.B., at 186, 187. See *Duncan Fox & Co. v. Schrempf & Bonke* [1915] 3 K.B. 355, 364, *per* Swinfen Eady, L.J., *supra*, *Arnhold Karberg & Co. v. Blythe, Green, Jourdain & Co.* [1916] 1 K.B. 495, 514, *per* Warrington, L.J., *supra*; *Reilly v. R.* [1934] A.C. 176, 180. Where the Parliament of Canada abolished an office by statute, no claim lay for damages for breach of contract.

See Lord Buckmaster's explanation in *Matthey v. Curling* [1922] 2 A.C. 180, 227. And see *per* Lord Wright in *The Cricklewood Case* (1945), 61 T.L.R. 202, 207 ; *infra*, 578.

<sup>5</sup> *In re an Arbitration between Shipton, Anderson & Co. and Harrison Brothers and Co.* [1915] 3 K.B. 676, 682, 683, *per* Lord Reading, C.J., *supra*. See Williston, s. 1939 : "Clearly, prevention by an executive and administrative order designed for the benefit of the general public may be considered excusable impossibility whether the order is directed to the general public or to an individual." See *Restatement*, s. 458.

See *W. T. Hawkes & Co. v. Henderson & Liddell* (1920), 4 Ll. L. Rep. 22 (export of sugar prohibited from Barbados) ; *Samuel Sanday & Co. v. Cox, McEuen & Co.* (1922), 10 Ll. L. Rep. 459, 462 (where Atkin, L.J., said that the prohibition must be "effective to prevent the particular cargo from being exported") ; *Isles Steam*

## 5. IMPOSSIBILITY OF FULFILMENT OF FUNDAMENTAL PURPOSE

Where, from the terms or the surrounding circumstances of a contract, as recognised by both parties, the mutual purpose of the contract was assumed by both as its foundation, and, without default of either party, that mutual purpose cannot be fulfilled owing to a risk or contingency which the parties have not undertaken or provided for, both parties are discharged from further performance of the contract.<sup>1</sup>

*Shipping Co., Ltd. v. Theodoridi & Co.* (1920), 24 Ll. L. Rep. 362 (partial prohibition by Roumanian Government of export of grain, did not amount to "prohibition").

Upon the calling up under the National Service (Armed Forces) Act, 1939, s. 4 (1), of a person liable to military service, his contract of employment is terminated. See *Marshall v. Glanville* [1917] 2 K.B. 87, 90, per Rowlatt, J.

Similarly, orders or directions made or given by "a competent authority" to persons in charge of "war production undertakings" or any other undertaking, and a direction given by the Minister of Labour and National Service to any person in the United Kingdom to perform a specified service, will have the effect of dissolving any contract which is inconsistent with those orders or directions: see Defence (General) Regulations, 1939, regs. 54c, 55 (2A) and (5A), 58A.

And see the *Metropolitan Water Board Case* [1918] A.C. 119, 128.

<sup>1</sup> *Krell v. Henry* [1903] 2 K.B. 740. The rule submitted is blended from the principles laid down by Vaughan Williams, L.J. (at 749, 751), and the test in which Romer, L.J., reluctantly concurred (at 755). What was "the foundation" of the contract? asks Vaughan Williams, L.J. Did the defendant under this contract undertake that risk? says Romer, L.J. It is submitted that both the decision and its reasoning are sound and accurate.

The destruction of "the foundation" of the contract was the test laid down by Cleasby, B., in *Robinson v. Davison* (1871), L.R. 8 Ex. 269, 278— not cited in *Krell v. Henry*— and the criterion proposed by Viscount Haldane in the *Tamplin Case* [1916] 2 A.C. 397, 407, 407, as the touchstone of frustration. Moreover, as an example of "the underlying ratio" proposed by Lord Shaw in *Horlock v. Beal* [1916] 1 A.C. 480, 512, 513, as "the failure of something which was at the basis of the contract in the mind and intention of the contracting parties," *Krell v. Henry* is singled out for approval. So also McCardie, J., in the *Blackburn Bobbin Case* [1918] 1 K.B. 540, 544.

(a) *Mr. P. A. Landon* (1936), 52 L.Q.R. 168-172, has vigorously marshalled the array of judicial and juristic opinion in favour, and refers to *Pollock's* contemporaneous observation upon "the justice of the court's conclusion" ((1904), 20 L.Q.R. 3, 4). *Salmond and Winfield* (at 306) say: "while there can be no doubt as to the soundness of the conclusions in this case, the reasoning of the court is open to the observation that the case was dealt with as if it was one of impossibility of performance, as in *Taylor v. Caldwell*, which it clearly was not." The contract is frustrated, "not by supervening impossibility of performance, but by supervening impossibility of the fulfilment of the purposes with which the contract was made." This test seems to the author, sound. *Professor Buckland* points out that there was no real impossibility. "The hirer can use the seats but will see no show. But the whole intent of the transaction is frustrated." The decision in *Krell v. Henry*, he observes, is "perfectly sound" (46 Harv. L. Rev. 1290, 1291). From this case, Scrutton, *Charterparties*, 119, deduces the principle of discharge by supervening impossibility of performance "(iv) where circumstances, of which the parties must have regarded the continued existence as essential to performance, cease to exist."

(b) On the other side is Williston: performance is impossible, but the "expected value of performance [has been] fortuitously destroyed" (s. 1954). (Williston recognises that the "justice" of these decisions is "plain" (s. 1935).) *See also* s. 461 of *The Restatement*, "Non-Existence of Essential Facts other than Specific

In *Krell v. Henry*, by a contract in writing of 20th June, 1902, Henry agreed to hire from Krell for £75 a flat in Pall Mall for two days, 26th and 27th June—"during the days (not the nights)." The contract contained no reference to the coronation procession (which had been announced to take place on those days and to pass along Pall Mall), or to any other purpose. An announcement was exhibited in the windows of Krell's flat, stating that windows to view the coronation procession were to be let. The housekeeper told Henry that Krell was willing to

*Things or Persons*" include the "Coronation Cases," which are found in the Chapter on "Conditions" (ch. 10, Topic 3: "*Constructive Conditions and Failure of Consideration in Promises for an Agreed Exchange*") under the heading "*Frustration of the Object or Effect of the Contract*" (s. 288).

(c) Professor Gutteridge criticises the decision: "the real issue was whether the consideration had failed or not" (51 L.Q.R. 109).

(d) Professor Buckland observes: "Although the court in *Krell v. Henry* made a decision which is itself perfectly sound—it transformed the rule laid down in *Stubbs v. Holyprell* (1867), L.R. 2 Ex. 311—that in a divisible contract work done must be paid for into the rule . . . that in a divisible contract 'subsequent impossibility does not affect rights already acquired'" (46 Harv. L. Rev. 1290).

(e) Lord Wright criticises the decision more severely, describing the extension of the doctrine in the "Coronation Seat Cases" as "illegitimate." "In such a case it would seem that each party was able to give or to receive all that the contract specified, and it would seem that in future any court not bound by authority would so hold" (*Legal Essays and Addresses*, 256). Further, in delivering the advice of the Judicial Committee in *The Maritime Fish Case* [1935] A.C. 524, 528, 529, and in discussing *Krell v. Henry*, Lord Wright declared: "The correctness of that decision has been questioned, for instance, by Lord Finlay, L.C., in *Larrinaga v. Société Franco-Américaine* (1923), 29 Com. Cas. 1, 7; Lord Finlay observed: 'it may be that the parties contracted in the expectation that a particular event would happen, each taking his chance, but that the actual happening of the event was not made the basis of the contract.'" Lord Wright continues: "The authority is certainly not one to be extended." Mr. Landon has pointed out that Lord Finlay's opinion, expressed in 1923, was based upon a doubt of Pollock in an out-of-date edition (8th ed., 439), which he had withdrawn in the 9th edition of 1921. See, however, the comments upon *Krell v. Henry*, in *The Constantine Case* [1942] A.C. 154, 164, 183, 198, per Viscount Simon, L.C., and Lord Wright and Lord Porter.

And see McElroy and Williams, *Impossibility of Performance*, 88-104.

(f) Mr. D. M. Gordon (of Canada) vigorously joins issue with Mr. Landon ((1936), 52 L.Q.R. 324-326): "If, before the contract was signed, the lessee [*sic*] had said to the landlord [*sic*]: 'Oh, I must have a proviso that, if the procession do not take place, the deal is off,' I think the landlord would have retorted: 'No! you are trying to make me take the risks, and you are the one to take them; you are the one who is going to make the big profits if things go right. Either you sign an unconditional contract, or I will deal with someone who will.'" In the decision, Mr. Gordon finds neither "justice," nor even "common-sense result."

"The foundation of the contract" is a question of fact, having regard to all the circumstances: see per Vaughan Williams, L.J., in *Krell v. Henry* [1903] 2 K.B. 740, 751, and per Romer, L.J., at 755. See also per Viscount Haldane in the *Tamplin Case* [1916] 2 A.C. 397, 407; and see per Viscount Maugham in *The Constantine Case* [1942] A.C. 154, 164.

With great respect, Lord Wright's analysis of what the court really does (*op. cit.*, 255, 258), exactly fits the "Coronation Cases." Let the jurist, Lord Wright, answer Lord Wright the judge: "There is a contract; something has happened under it which the parties have not provided for because they did not anticipate it; it is unjust that the parties should continue bound."

let the suite for the purpose of seeing the procession for both days, but not nights. Henry paid a deposit of £25. Owing to the serious illness of the King, the processions were cancelled. Henry refused to pay the balance of the rent and counter-claimed for the return of the deposit. Darling, J., held, citing and following the judgment of Blackburn, J., in *Taylor v. Caldwell*,<sup>1</sup> that there was an implied condition that the procession should take place, and gave judgment for the defendant on the claim and the counterclaim.<sup>2</sup>

"... if it had been brought to the knowledge of these parties that the procession might not go by, would they not have said, 'Of course, if the procession does not go by, the windows are useless'?"<sup>3</sup>

On appeal, the counterclaim was abandoned. Krell contended that the contract was absolute and that by suitable words Henry might have guarded himself against the risk. Henry argued that the real question was: *What was the bargain?* The certainty of the coronation and the procession was "the basis of the contract." It was impossible for the plaintiff to give what he bargained for: there was a *total failure of consideration*.

#### (a) *Assumed Basis of the Contract*

Vaughan Williams, L.J., delivered a considered judgment. The real question was how far the principle in *Taylor v. Caldwell* extended. *Nickoll & Knight v. Ashton, Edridge & Co.*,<sup>4</sup> had applied this principle to the

"cessation or non-existence of an express condition or state of affairs, going to the root of the contract, and essential to its performance."<sup>5</sup>

But the principle was not limited to cases where the event causing the impossibility of performance was the destruction or non-existence of the subject-matter, or of some condition or state of things *expressly* mentioned in the contract. It is sufficient "if that condition or state of things clearly appears by extrinsic evidence—

to have been assumed by the parties to be the foundation or basis of the contract, and the event which causes the impossibility is of such a character that it cannot reasonably

<sup>1</sup> (1863), 3 B. & S. 826.

<sup>2</sup> (1902), 18 T.L.R. 823. See the cases put in argument, *ad loc.*

<sup>3</sup> *Ib.*, at 824.

<sup>4</sup> [1901] 2 K.B. 126. See *Huni & Wormser, Ltd. v. E. D. Sassoon & Co.* (1920), 5 Ll. L. Rep. 72, 199, where a contract was frustrated by casualty to a named ship which ceased to be a cargo-carrying vessel in February-March, 1920, when "expected ready to load."

<sup>5</sup> [1903] 2 K.B., at 748: author's italics.



be supposed to have been in the contemplation of the contracting parties when the contract was made."<sup>1</sup>

One must *first* ascertain, not necessarily from the terms of the contract, but from "surrounding circumstances recognised by both contracting parties," what is "the substance of the contract." *Next*, one must ask—

"whether that substantial contract needs for its foundation the assumption of the existence of a particular state of things. If it does, this will limit the operation of the general words, and in such case, if the contract becomes impossible of performance by reason of the non-existence of the state of things assumed by both contracting parties as the foundation of the contract, there will be no breach of contract thus limited."<sup>2</sup>

The term "impossible of performance," it is true, was used in the judgment, yet it was quite "possible" for Krell to let, and for Henry to take, the flat. But the "substance" of the contract was to let and to take rooms *for the purpose of enabling Henry to see particular processions; in that sense*, upon the cancellation of the processions, the contract *had* clearly become "impossible of performance."

The taking place of those processions "was regarded by both parties as the foundation of the contract"; it "cannot reasonably be supposed to have been in the contemplation of the contracting parties, when the contract was made," either that the coronation would not be held as proclaimed, or that the processions would not take place along the proclaimed route.

The plaintiff had argued that if, under those circumstances, the contract was dissolved,

"it would follow that if a cabman was engaged to take someone to Epsom on Derby Day at a suitable enhanced price for such a journey, say £10, both parties to the contract would be discharged in the contingency of the race at Epsom for some reason becoming impossible."

Vaughan Williams, L.J., did not agree: "The happening of the race would not be the foundation of the contract." The *purpose* would be to go to the Derby and the price would be the higher; but the cab had "no special qualifications . . . for this particular occasion." "Any other cab would have done as well." Moreover, the hirer could still have said: "Drive me to Epsom. I will pay you the agreed sum."<sup>2</sup>

Here, on the other hand, for the letter as for the hirer, the processions and the position of the rooms were the basis of the contract; if the King had died before the coronation, the hirer could not have insisted on the rooms. Each case depends upon its own facts: three questions must be asked:—

<sup>1</sup> [1903] 2 K.B., at 749.

<sup>2</sup> *Ib.*, at 750, 751.

"First, what, having regard to all the circumstances, was the foundation of the contract? Secondly, was the performance of the contract prevented? Thirdly, was the event which prevented the performance of the contract of such a character that it cannot reasonably be said to have been in the contemplation of the parties at the date of the contract?"

If the answer to all these questions is *yes*,

"both parties are discharged from further performance of the contract."<sup>1</sup>

(b) *Parol Evidence Admissible*

In determining whether the implication ought to be made, one must look not only at the *words* of the contract,

"but also at the surrounding facts and the knowledge of the parties of those facts."<sup>2</sup>

Vaughan Williams, L.J., uses the term "*frustration*":—

"In this case," he says, "where we have to ask ourselves whether the *object* of the contract was *frustrated* by the non-happening of the coronation and its procession on the days proclaimed, *parol evidence is admissible* to show that the subject of the contract was rooms to view the coronation procession, and was so to the knowledge of both parties. When once this is established, I see no difficulty whatever in this case."<sup>3</sup>

(c) *The Krell v. Henry Rule*

Whether the fact be that "*the direct subject of the contract should perish or fail to be in existence at the time of performance of the contract*"; or that "*a state of things or condition expressed in the contract and essential to its performance persists or fails to be in existence at that time*"; or that *the condition* which was "in the contemplation of both parties, the foundation of the contract" is not expressly mentioned: in all these cases the principle of *Taylor v. Caldwell*<sup>4</sup> equally applies.<sup>5</sup>

When the whole judgment is considered, the reasoning of Vaughan Williams, L.J., in *Krell v. Henry*<sup>6</sup> is clear, logical and

<sup>1</sup> [1903] 2 K.B., at 751; author's italics.

<sup>2</sup> *Id.*, at 752, following *Jackson's Case* (1873), L.R. 8 (C.P. 572; (1874), L.R. 10 (C.P. 125, *infra*. 474–476).

<sup>3</sup> [1903] 2 K.B., at 754; author's italics. See, also, *per* Scrutton, L.J., *arguendo*, in *The Comptoir Case* [1920] 1 K.B. 868, 883; *infra*, 559: "It is the duty of court to construe a contract with the aid of surrounding circumstances found by the judge or other tribunal whose function it is to find the facts" (*Behn v. Burness* (1863), 3 B. & S. 751, 756, is cited). And this, in his judgment: "the circumstances under which the contract was made, which the court is entitled to know in construing the contract, are facts to be found by the judge, and their importance to the commercial adventure may be a fact which assists the court materially in coming to a conclusion" (*ib.*, at 898, 899).

<sup>4</sup> (1863), 3 B. & S. 826.

<sup>5</sup> [1903] 2 K.B., at 754.

<sup>6</sup> [1903] 2 K.B. 740

convincing. The rule in *Krell v. Henry* when conjoined, in the course of the War of 1914, with the rule of frustration of voyage, in *Jackson v. Union Marine Insurance Co.*<sup>1</sup> has produced a strong current of modern authority that frustration of the adventure is a *general doctrine applicable to all contracts*.<sup>2</sup>

(d) *Question of the Circumstances*

In *Herne Bay Steam Boat Co. v. Hutton*,<sup>3</sup> the same Court of Appeal, on the facts of that case, came to a different conclusion.

A Royal Naval Review was publicly announced to take place at Spithead on 28th June, 1902. The company entered into a written agreement with H that the *Cynthia* should be at his disposal to take passengers from Herne Bay to view the naval review, and for a day's cruise round the fleet; also, on 29th June, for similar purposes. The price was £250, payable £50 down, balance before the ship left Herne Bay. H paid the deposit when the agreement was signed. On 25th June the review was officially cancelled, but on 28th and 29th June the fleet remained anchored at Spithead. The company swiftly wired to H: "What about *Cynthia*? She ready to start six to-morrow. Waiting cash." Receiving no reply, the ship resumed her ordinary sailings. On 29th June H repudiated the contract. The company sued him for £200, the balance, reduced, at the trial, by £90, being the profits they had made during the two days. It was held that the naval review was *not the sole basis of the contract*; no total failure of consideration had occurred, and no total destruction of the subject-matter.

The plaintiffs argued that one of the purposes of the contract was to cruise round the fleet, which was quite possible.

For the defendant it was submitted that the sole object of the contract was that the ship should be a "review-visiting ship"; as such, the ship never existed and the contract was impossible of performance.

Vaughan Williams, L.J., said that the happening of the naval review was not the foundation of the contract. This was similar to a case where a person had engaged a brake for Epsom but the races were postponed owing to infectious disease.<sup>4</sup>

<sup>1</sup> (1874), L.R. 10 C.P. 125, *infra*, 471. See (Chorley, 8 Mod. L. Rev., 89.

<sup>2</sup> Thus McCardie, J., in the *Blackburn Bobbin Case* [1918] 1 K.B. 540, 545 :-

"It is obvious that what I will call the *Krell v. Henry* rule as now formulated is theoretically capable of application to all contracts . . ."

McCardie, J., indeed, classified the cases on frustration during war as particular applications of the *Krell v. Henry* rule: [1918] 1 K.B., at 547, 548.

<sup>3</sup> [1903] 2 K.B. 683. Judgment was delivered on 6th August (the day of the argument), five days before the considered judgment in *Krell v. Henry*.

<sup>4</sup> [1903] 2 K.B. 683, at 689. Williston approves the decision in this case, which can be supported on the facts (s. 1954), but Mr. Landon rightly says that "the contrary results reached" in this case and in the imaginary case put by Vaughan

## 6. FRUSTRATION OF ADVENTURE OF CHARTERPARTY

"A delay in carrying out a charterparty caused by something for which neither party was responsible, if so great and long as to make it unreasonable to require the parties to go on with the adventure, entitled either of them, at least while the contract was executory, to consider it at an end."<sup>1</sup>

(a) *Blockade : Unreasonable Delay*

"The effect of such a state of things as an effective blockade of the port of discharge is not merely to excuse delay in the carrying out of the contract, but (that) after a reasonable time, it relieves the parties, the contract being altogether executory,<sup>2</sup> from the performance of it: *Geipel v. Smith*."<sup>3</sup>

It was agreed by charterparty that the defendants' vessel should, with all convenient speed, sail as directed by the

\*Williams, L.J., "are more difficult to reconcile with the requirements of expediency" (52 L.Q.R., at 171)

See *Minneville v. Café de Paris (London), Ltd.* (1936), 52 T.L.R. 413, 414, where the question arose whether the leader of a band was entitled to be paid by a restaurant for six days during which, by reason of national mourning on the death of His late Majesty George V, the restaurant was closed. The contract contained a "no play, no pay" clause. On Monday, 20th January, the late King was seriously ill. On Tuesday, all places of entertainment in London were closed, on the remaining four nights they were open. For those four nights the plaintiff was entitled to be paid.

<sup>1</sup> Per Earl Loreburn in the *Tamplin Case* [1916] 2 A.C. 397, 404, using the language of Lord Blackburn, and referring to *Geipel v. Smith* (1872), L.R. 7 Q.B. 404, *Jackson v. Union Marine Insurance Co., Ltd.* (1873), L.R. 8 C.P. 572 (1874), L.R. 10 C.P. 125, *Dahl v. Nelson, Donkin & Co.* (1881), 6 App.Cas. 38. In *Krell v. Henry*, Vaughan Williams, L.J., cites and purports to follow *Jackson's Case*.

<sup>2</sup> Later cases show that the principle is the same, even if the contract has been part performed. See per Lord Sumner in the *Bank Line Case* [1919] A.C. 435, 455. See also *Bonsuile v. Thames and Mersey Marine Insurance Co.* [1897] A.C. 609, 612, 613, where the steamer's main shaft broke during the voyage and the necessary delay for repairs frustrated the object of the adventure. And see *Embarcos v. Sydney Road & Co.* [1914] 3 K.B. 45, 53, 54, where, upon the declaration of war between Greece and Turkey, the charterers cancelled the charterparty because the ship, if she had attempted to leave the Black Sea, would have been captured. Scrutton, J., held that the charterers were justified, even though a portion of the cargo had been loaded:

"Commercial men must not be asked to wait till the end of a long delay to find out from what in fact happens whether they are bound by a contract or not, they must be entitled to act on reasonable commercial probabilities at the time when they are called upon to make up their minds."

And see Lord Wright's speech in *The Denny Mott Case* [1944] A.C. 265, 278: "... the real principle which applies in cases of commercial responsibility is that business men must not be left in indefinite suspense. If there is a reasonable probability from the nature of the interruption that it will be of indefinite duration, they ought to be free to turn their assets, their plant and equipment and their business operations into activities which are open to them, and to be free from commitments which are struck with sterility for an uncertain future period."

<sup>3</sup> (1872), L.R. 7 Q.B. 404, 412, per Blackburn, J.

plaintiffs and load a cargo of coals, and that as soon as wind and weather should permit, should proceed to Hamburg and there deliver the cargo, *restraint of princes (inter alia)* excepted. The defendants refused to load and to carry out the charterparty. The defence was that before anything had been done under the contract, war broke out between France and Germany; that Hamburg was blockaded by the French fleet; that England remained neutral, and that it became unlawful for the defendants, British subjects, further to carry to Hamburg on a British ship. Further, except by running the blockade, the charterparty could not be carried out within a reasonable time. The pleas disclosed a good defence: performance was prevented by "restraint of princes."

The defendants might have loaded at Newcastle, but since there was an obstacle to their carrying the coal to Hamburg, "they were excused from taking the initial step." A blockade is an act of State, and therefore, a restraint of princes. The defendants' duty was to wait a reasonable time to see if the restraint was removed.<sup>1</sup>

Blackburn, J., said that the ship and the cargo were not bound to be kept ready, perhaps for years.

"It would be most inconvenient to give such a construction to the contract, and would be to frustrate the very object of such a contract, viz., the speedy transport of the shipper's goods, and the remunerative employment of the shipowner's vessel."<sup>2</sup>

"The object of each of them was the carrying out of a commercial speculation within a reasonable time; and if restraint of princes intervened and lasted so long as to make this impossible, each had a right to say, 'Our contract cannot be carried out'; and, therefore, the shipowner had a right to sail away, and the charterer to sell his cargo or refrain from procuring one, and treat the contract as at an end."<sup>3</sup>

#### (b) Delay Frustrating Commercial Speculation

Where "the time necessary to get a ship off, and repairing her so as to be a cargo-carrying ship, was so long as to put an end in a commercial sense to the commercial speculation entered into by the shipowner and charterers," the charterers were not bound to load the ship; the contract was at an end: *Jackson v. Union Marine Insurance Co., Ltd.*<sup>4</sup>

<sup>1</sup> (1872), L.R. 7 Q.B., at 410, 411, *per* Cockburn, C.J.

<sup>2</sup> *Ib.*, at 412; author's italics. *Hadley v. Clarke* (1799), 8 Term Rep. 259, where the cargo was already on board before the embargo, was distinguished.

<sup>3</sup> *Ib.*, at 413; author's italics.

<sup>4</sup> (1874), L.R. 10 C.P. 125, 141, *per* Bramwell, B. See *Auluckundis v. Norwich Union Fire Insurance Society* [1937] 1 K.B. 1, 41, *per* Scott, L.J. And see *Huni & Wormser, Ltd. v. E. D. Sassoon & Co.* (1920), 5 Ll. L. Rep. 72, 199; *supra*, 469, n. 4.

In November, 1871, a shipowner entered into a charterparty by which the ship was to proceed with all despatch from Liverpool to Newport and load a cargo of iron rails for San Francisco. On 2nd January, 1872, the ship sailed from Liverpool, and on the 3rd, she got aground in Carnarvon Bay. On 18th February she was got off; not until the end of August was she repaired. Meanwhile, on 15th February, the charterers threw up the charter and chartered another ship; the rails were wanted for the construction of a railway. The charterers, it was held, were not bound to load; there was a loss of chartered freight by perils of the sea.<sup>1</sup>

The effect of this decision is stated thus, by Brett, J. :—

“Where a contract is made with reference to certain anticipated circumstances, and where, without any default of either party, it becomes wholly inapplicable to or impossible of application to any such circumstances, it ceases to have any application; it cannot be applied to other circumstances which could not have been in the contemplation of the parties when the contract was made.”<sup>2</sup>

On appeal, the decision was affirmed.<sup>3</sup> Bramwell, B., delivered the majority judgment.<sup>4</sup>

The jury had found that the *contemplated* voyage had become impossible: a voyage after the ship was repaired would have been

“a different voyage . . . different as a different adventure—

<sup>1</sup> See the careful analysis by Brett, J., in (1873), L.R. 8 C.P. 572, 578, 580, citing *MacAndrew v. Chapple* (1868), L.R. 1 C.P. 643, 648, where Willes, J., said: “A delay or deviation which . . . goes to the whole root of the matter, deprives the charterer of the whole benefit of the contract, or *entirely frustrates the object of the charterer* in chartering the ship, is an answer to an action for not loading a cargo, but (that) loss, delay, or deviation short of that gives an action for damages, but does not defeat the charter” (author’s italics).

<sup>2</sup> (1873), L.R. 8 C.P. at 581, cited with approval by Lord Sumner, in the *Hirji Mulji* [1926] A.C. 497, 508. In the Court of Common Pleas, Bovill, C.J., dissented. He propounded, with much learning, the old view “The law has no power to make a contract different from that which a person has entered into . . . If a man chooses to enter into a contract to do a particular act, he is bound to answer for it, although the performance of the Act may be prevented by the occurrence of unforeseen circumstances which it was beyond his power to control, and which have arisen from no act or default of his own, because he might and ought to have provided for the contingency by his contract” (L.R. 8 C.P. at 585, 586).

<sup>3</sup> (1874), L.R. 10 C.P. 125 (Exchequer Chambers). Cleasby, B., dissenting in a long and reasoned judgment. No time limit was specified in the charterparty. Certainty in obligations is essential; where the parties have specified a provision upon a particular subject, *expressum facit cessare tacitum* (at 128). By introducing an implication grounded on convenience, the course of contract is most difficult and problematical (at 131). “A construction which gives a certain, clear and precise rule of conduct to act by in all cases, upholding a contract,” is to be preferred “to one which introduces uncertainty and difficulty as to conduct and admits of reasons for defeating a contract which are to be derived from considerations of interest at the time” (at 132).

<sup>4</sup> Blackburn, Mellor, Lush, JJ., and Amphlett, B., concurred.

a voyage for which at the time of the charter the plaintiff had not in intention engaged the ship, nor the charterers the cargo; a voyage as different as though it had been described as intended to be a spring voyage, while the one after the repair would be an autumn voyage."<sup>1</sup>

The contract, it had been argued, was not to perform a definite voyage, but to carry a cargo of rails at a future time, however distant, provided that the vessel sailed to Newport with all possible despatch (perils of the seas excepted). "Reason and good sense" required that the charter be interpreted as meaning that the vessel should arrive in time for the voyage: this was a *condition precedent*. Non-arrival "at such a time that in a commercial sense the commercial speculation entered into by the shipowner and charterers should not be at an end, but in existence," put an end to the contract.<sup>2</sup>

"The same argument differently put" led to the same result: "Where no time is named for the doing of anything, the law attaches a reasonable time." In this charter, there was an *implied condition of a reasonable time*.

"The charterer has no cause of action but is released from the charter. When I say *he* is, I think *both* are. The condition precedent has not been performed, but by default of neither. It is as though the charter were conditional on peace being made between countries A and B, and it was not, or as though the charterer agreed to load a cargo of coals, strike of pitmen excepted. If a strike of probably long duration began, he would be excused from putting the coals on board, and would have no right to call on the shipowner to wait till the strike was over. The shipowner would be excused from keeping his ship waiting, and have no right to call on the charterer to load at a future time."<sup>3</sup>

Thus, if A, who enters the service of B, becomes ill and cannot perform his work, no action will lie against him, and B may engage another servant "if his [*sc.* A's] illness would put an end, in a business sense, to their business engagement, and would frustrate the object of that engagement."<sup>4</sup>

"Not arriving in time for the voyage contemplated, but at such a time that it is frustrated, is not only a breach of contract, but discharges the charterer. And so it should, though he has such an excuse that no action lies."<sup>5</sup>

"A loading of cargo in August would have been a new adventure, a new agreement."

This judgment pre-figures the reasoning to be applied forty years on.

<sup>1</sup> (1874), L.R. 10 C.P. 125, at 141.

<sup>2</sup> *Ib.*, at 143.

<sup>3</sup> (1874), L.R. 10 C.P. 125, at 144, 145.

<sup>4</sup> *Ib.*, at 145.

<sup>5</sup> *Ib.*, at 148.

(c) *The Legal Theory; Lord Watson*

In *Dahl v. Nelson, Donkin & Co.*,<sup>1</sup> a charterparty provided that a ship should sail to "London Surrey Commercial Docks or as near thereto as she may safely get." The docks were full; entrance was refused. The shipowner, it was held, was *not bound to wait for an unreasonable period until a discharging berth in the docks could be assigned to the ship.* Lord Watson expounds the judicial process by which the contract is interpreted and (in effect) a "constructive condition" is introduced:—

"When the parties to a mercantile contract, such as that of affreightment have not expressed their intentions in a particular event, but have left these to implication, a *Court of Law*, in order to ascertain the implied meaning of the contract, must assume that the parties intended to stipulate for that which is fair and reasonable, having regard to their mutual interests and to the main objects of the contract. In some cases that assumption is the only test by which the meaning of the contract can be ascertained. There may be many possibilities within the contemplation of the contract of charterparty which were not actually present to the minds of the parties at the time of making it, and, where one or other of these possibilities becomes a fact, the meaning of the contract must be taken to be, not what the parties did intend (for they had neither thought nor intention regarding it) but that which the parties, as fair and reasonable men, would presumably have agreed upon if, having such possibility in view, they had made express provision as to their several rights and liabilities in the event of its occurrence."<sup>2</sup>

This, it is submitted, is the *truc basis of the modern doctrine of frustration of the adventure*: the "implied condition" is, in the last analysis, a "constructive condition" read into the contract by the court and *imputed* to the parties.

This classical exposition has been accepted by Lord Sumner as "an authoritative explanation of the legal theory on which the doctrine rests . . ."<sup>3</sup>

And Lord Wright finds in it the essence of his own view of the "supplementing power" of the court:—

"In short, in ascertaining the meaning of the contract and its application to the actual occurrences, the court has

<sup>1</sup> (1881), 6 App. Cas. 38.

<sup>2</sup> (1881), 6 App. Cas. 38, at 59. author's italics. In the *Tamplin Case* [1916] 2 A.C. 307, 404, Earl Loreburn declared that the language used in these three charterparty cases, as to "frustration of the adventure," "merely adapts it to the class of case in hand." In other words, the rule is "a mere application to commercial adventures of a broad contractual principle," *per* McCaigie, J., in the *Blackburn Bobbin Case* [1918] 1 K.B. 540, 544.

See *Browning v. Crumlin Valley Collieries* [1926] 1 K.B. 522, 529.

<sup>3</sup> In the *Bank Line Case* [1919] A.C. 435, 459.



to decide, not what the parties actually intended, but what, as reasonable men, they should have intended. The court personifies for this purpose the reasonable man."<sup>1</sup>

<sup>1</sup> *The Constantine Case* [1942] A.C. 154, 185.

## CHAPTER XVIII

### FRUSTRATION BY WAR

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### A. ARISING OUT OF WAR OF 1914

THE doctrine that upon frustration of the mutually contemplated adventure the contract is dissolved,<sup>1</sup> is of general application and may be applied to *any contract*.<sup>2</sup>

<sup>1</sup> "Frustration of the contract," Lord Wright explains in *The Constantine, Case* [1942] A.C. 154, 182, "is an elliptical expression. The fuller and more accurate phrase is 'frustration of the adventure or of the commercial or practical purpose of the contract' This change in language corresponds to a wider conception of impossibility . . ." See the argument of R. A. Wright, K.C. (as he then was), in *In re Badische Co., Ltd.* [1921] 2 Ch. 331, 351, 352.

<sup>2</sup> See per Earl Loreburn in the *Tamplin Case* [1916] 2 A.C. 397, 404; per

"The doctrine is not peculiar to charters; it is applicable to all contracts."<sup>1</sup>

The doctrine it is submitted, applies equally to a contract which creates a *leasehold interest in land*.<sup>2</sup> The contract dissolved, "the estate in land falls with it."<sup>3</sup> The question has been recently discussed in *The Cricklerwood Case*,<sup>2</sup> in which judicial opinion in the House of Lords was evenly divided.

### 1. SEAMAN'S CONTRACT OF SERVICE

Where a *seaman's contract of service* for a two years' voyage was interrupted, upon the declaration of war, by the detention of the ship by the enemy and the internment of the crew, the contract was dissolved from the date of detention: no further wages became payable: *Horlock v. Beal*.<sup>3</sup>

"The adventure was . . . lost," said Lord Shaw; "that stoppage and loss, having arisen from a declaration of war, must be considered to have been caused for a period of indefinite duration, and so to have effected a solution of the contract arrangements for and dependent upon the completion or further continuance of the adventure."<sup>4</sup> After discussing the principle of "the continued existence of the subject-matter," Lord Shaw proceeds:—

"It is manifest that the principle last adumbrated was capable of a wider practical and logical application than to the failure of a certain *corpus*. The underlying *ratio* is the

McCardie, J., in the *Blackburn Bobbin Case* [1918] 1 K.B. 541, 545; *per* Russell, J. (as he then was), in *In re Badische Co., Ltd.* [1921] 2 Ch. 331, 379-383.

See also (1918), Cd. 8975, quoted in (1939), Cmld. 6109, *supra*.

<sup>1</sup> *Per* A. T. Lawrence, J., in *Scottish Navigation Co., Ltd. v. W. A. Souter & Co.* [1917] 1 K.B. 222, 249, *infra*. See the argument of Leslie Scott, K.C., in *In re Badische Co., Ltd.*, *supra* (at p. 365), and the observations of Russell, J. (at 382, 383). And see the illuminating judgment of McCardie, J., in the *Larinnaga Case* (1922), 27 Com. Cas. 160, 174-181.

"The condition is that a revolution of circumstance will dissolve the contract (by the operation of an implied condition) if the change of facts be such as to destroy the mutually contemplated basis of the bargain" (at 174). And again: "The condition is the same in principle whether a subject-matter be destroyed, or an actor fall seriously ill, or a set of circumstances regarded by both parties, as the very basis of the bargain, ceases to exist" (at 174, 175).

<sup>2</sup> (1945), 61 T.L.R. 202, following Viscount Simon, L.C., and Lord Wright (Lord Porter reserving the point). Lord Russell of Killowen and Lord Goddard thought that a lease which creates and vests in the lessee an estate or interest in land cannot be ended by frustration.

See *infra*, 568. For the opinions, *infra*, 574-580.

They relied upon *London and Northern Estates Co. v. Schlesinger* [1916] 1 K.B. 20, 24, *per* Lush, J.: *infra*; *Whitehall Court, Ltd. v. Ellinger* [1920] 1 K.B. 680, 686, 687, *per* Earl of Reading, C.J.; *Matthey v. Curling* [1922] 2 A.C. 180, 185, 186, *per* Bankes, L.J.; at 210, *per* Younger, L.J.; at 234-237, *per* Lord Atkinson Atkin, L.J., dissented, in the Court of Appeal (at 200).

<sup>3</sup> [1916] 1 A.C. 486 (Lord Parmoor dissenting), *supra*, 381, 382. Lord Atkinson carefully examined the decisions (at 495-506).

<sup>4</sup> [1916] 1 A.C., at 507.

failure of something which was at the basis of the contract in the mind and intention of the contracting parties."<sup>1</sup>

He points out how this *ratio* has been "properly developed in recent years," in particular, by *Krell v. Henry*<sup>2</sup>: the principle extends to "the cessation or non-existence of an express condition or state of things going to the root of the contract." This view, he continues, is "in entire accord with that doctrine of frustration of voyage which has become fully accepted since the case of *Jackson v. Union Marine Insurance Co.*,<sup>3</sup> with the doctrine underlying *Taylor v. Caldwell*,<sup>4</sup> and with sound legal principle."<sup>5</sup>

Lord Wrenbury propounded the following principle:—

"Where a contract has been entered into, and by a supervening cause beyond the control of either party its performance has become impossible, I take the law to be as follows: If a party has expressly contracted to do a lawful act, come what will—if, in other words, he has taken upon himself the risk of such a supervening cause—he is liable if it occurs, because by the very hypothesis he has contracted to be liable. But if he has not expressly so contracted, and from the nature of the contract it appears that the parties from the first must have known that the fulfilment would become impossible if such a supervening cause occurred, then upon such a cause occurring both parties are excused from performance. In that case a condition is implied that if performance becomes impossible the contract shall not remain binding."<sup>6</sup>

## 2. REQUISITION OF SHIP; TEMPORARY INTERRUPTION

Where a ship, while *under a time charterparty for sixty months*, was requisitioned by the Admiralty when the charterparty had nearly *three years to run*, and where the charterers were willing to continue the agreed freight, the interruption was *not* of such a character that frustrated the adventure: *The Tamplin Case*.<sup>7</sup>

The *F. A. Tamplin*, a tank steamship then building, was

<sup>1</sup> [1916] 1 A.C., at 512.

<sup>2</sup> [1903] 2 K.B. 740, 748.

<sup>3</sup> (1874), L.R. 10 C.P. 125.

<sup>4</sup> (1863), 3 B. & S. 826.

<sup>5</sup> [1916] 1 A.C., at 513.

<sup>6</sup> [1916] 1 A.C., at 525, 526.

<sup>7</sup> *F. A. Tamplin Steamship Co., Ltd. v. Anglo-American Petroleum Products, Ltd.* [1916] 2 A.C. 397. So held by Lord Buckmaster, L.C., Earl Loreburn and Lord Parker of Waddington (Viscount Haldane and Lord Atkinson dissenting).

The arbitrator had awarded that (subject to the opinion of the court) upon the date of requisition the charterparty came to an end. Atkin, J., decided against an implied condition that the steamer should remain fit for the carriage of oil: the requisition did not terminate or suspend the charterparty: [1915] 3 K.B. 668, 674, 675. The parties did not "necessarily" contemplate that the steamer should continue to be fit to carry oil. The charterers merely have to pay the freight; they are not obliged to use the ship for the carriage of oil.

His decision was affirmed by the Court of Appeal: [1916] 1 K.B. 485. The

chartered by a time charterparty in May, 1912, for sixty calendar months from December, 1912, to be employed within specified limits *for the carriage of oil*—with an *option* to the charterers to ship *other suitable cargo*—in such lawful trades as charterers or their agents should direct; £1,750 per month (reduced to £1,700 at the end of the first year) to be paid as hire. Arrests and restraints of princes were excepted. No voyage that would involve risk of seizure or capture was to be undertaken. The charterers might sublet to the Admiralty, the charterers remaining responsible. In December, 1914, the steamer was requisitioned for the Admiralty transport service in carrying fresh water for the fleet, until February, 1915; upon this requisition no question arose. She was then *requisitioned* by the Director of Transport; *was structurally altered*; and was *fitted for the transport of troops*. The charterparty had nineteen months to run. The owners claimed that the charterparty had been determined or suspended by the requisitioning and conversion of the ship. The charterers, who were willing to continue the freight (thinking to receive a greater sum than they would have to pay to the owners), contended that the charter subsisted.

It was argued that the requisition had destroyed the vessel as an oil-carrying ship; the commercial object of the adventure had been frustrated; the contract was at an end, or at least its performance was suspended. On the other side it was said that the only interest of the owner was to get his hire, which was preserved to him; the loss of use of the vessel affected not the owner but the charterer. Frustration—it was further contended—did not apply to a time charter.

The charterers argued that, in effect, there had been a subletting to the Admiralty. If they were right—Viscount Haldane pointed out—they would be entitled to retain the largely increased monthly payment made by the Government and pay the owners the contractual sum, only. If the owners were right, the charterers could claim compensation from the Government, but the owners would be entitled to the hire paid by the Admiralty. Compensation, however, was not argued.<sup>1</sup>

present interruption, said Bankes, L.J., was *contemplated* by the parties, and provided for in the exception, "restraint of princes" (at 491).

Upon the law (as stated in the House of Lords, affirming the Court of Appeal) there was no dispute; the difference was upon the correct inference from the facts: see *per* Viscount Haldane (at 406); and see *per* Lord Finlay, L.C., and Lord Dunedin, in *The Metropolitan Water Board Case* [1918] A.C. 119, 127; and *per* Lord Finlay, L.C., in *The Bank Line Case* [1919] A.C. 435, 442, 443; see also Scrutton, 116, 120-122.

Upon the facts, the opinion of the minority is, with respect, to be preferred. See Sir T. E. Scrutton, *The War and the Law* (1918), 34 L.Q.R. 125, 126.

<sup>1</sup> *Ib.*, at 410. Lord Parker, however, thought that both owner and charterer would be entitled to compensation. "Owner," in the Proclamation of 3rd August, 1914, included "all parties interested" (at 428).

(a) *The "Implied Condition"*

Earl Loreburn gave the classic exposition of the theory of the "implied term." He declared that a court, while having no inherent power to discharge a party from performance of a contract, can examine the contract and the circumstances in which it was made, not to vary, but to explain it,

"in order to see whether or not *from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist.*"

And if they must have done so, then a term to that effect will be implied, though it be not expressed in the contract."<sup>1</sup> Such a term can generally be implied only when "the discontinuance is such as to upset altogether the purpose of the contract."<sup>2</sup>

"... no court has an absolving power, but it can infer from the nature of the contract and the surrounding circumstances that a condition which is not expressed was a foundation on which the parties contracted."<sup>2</sup>

The language used in the cases on "frustration of the adventure" "merely adapts it to the class of cases in hand." Then follows this test which has been quoted again and again:—

"Were the altered conditions such that, had they thought of them, they would have taken their chance of them, or such that as sensible men they would have said, 'If that happens, of course, it is all over between us.' What, in fact, was the true meaning of the contract? Since the parties have not provided for the contingency, ought a court to say it is obvious they would have treated the thing as at an end?"<sup>3</sup>

<sup>1</sup> [1916] 2 A.C., at 403; author's italics.

Viscount Simon, L.C., in *The Constantine Case* [1942] A.C. 154, 163, approves this exposition of "the implied term"—as "the most satisfactory basis, I think, upon which the doctrine can be put..." And Lord Wright refers to the language of Blackburn, J., Earl Loreburn and Lord Sumner for "the explanation which has been generally accepted in English law," i.e., that "frustration depends on the court implying a term or exception and treating that as part of the contract" (at 186).

<sup>2</sup> "It is not enough, however, that this inference should be merely a reasonable inference to draw and nothing more. It must be an inference which it is necessary to draw in order to effectuate the intention of the parties as revealed by the language they have used": per Lord Atkinson, *Larrinaga Case* (1923), 29 Com. Cas. 11. Followed by Atkinson, J., in *King v. Michael Faraday, Ltd.* [1939] 2 K.B. 753, 762.

<sup>3</sup> [1916] 2 A.C., at 404.

"What, in fact, was the true meaning of the contract?"—Lord Wright, after considering certain explanations of the doctrine, takes up this suggestion and declares: "If the question is still open in English law, I should prefer to rest the principle simply on the true meaning of the contract, as it appears to the court": *The Constantine Case* [1942] A.C. 154, 187.

But see Lord Wright's speech in *The Denny Mott Case* [1944] A.C. 265, 275, criticising Earl Loreburn's test: "It is not possible, to my mind, to say that, if they had thought of it, they would have said: 'Well, if that happens, all is over between us.' On the contrary, they would almost certainly on the one side or the other have sought to introduce reservations or qualifications or compensations. As to that, the court cannot guess."

In the present case—although both parties expected years of peace—the continuance of peace was *not a tacit condition* of the contract. War might even enhance the value of the contract. If the interruption was unreasonable, that might be different; interruption had not been unreasonable nor could it be inferred that it would be unreasonable. But before the five years had expired there might be many months during which the ship might be available.

"I think they took their chance of lesser interruptions, and the condition I should imply goes no further than that they should be excused if substantially the whole contract became impossible of performance, or in other words impracticable, by some cause for which neither was responsible."<sup>1</sup>

(b) *Not Inconsistent with Express Provisions*

Lord Parker, accepting the test of the "implied condition" as a principle, *depending upon a term in the contract*, said:—

"It is, of course, impossible to imply in a contract any term or condition inconsistent with its express provisions, or with the intention of the parties as gathered from those provisions."<sup>2</sup>

Moreover, a *condition precedent* defeating a contract before its execution began, is easier to imply than a *condition subsequent*, defeating it when it is part performed. Further, there had been no case hitherto in which frustration had been applied to a *time charterparty*, as distinct from a charterparty which contemplated a particular voyage.<sup>3</sup> The present contract did not contemplate any commercial adventure in which *both* parties were interested.<sup>4</sup> The owners were merely concerned with the payment of freight by the charterers; the charterers might please themselves whether they used the ship.<sup>5</sup> Requisitioning was a "restraint of princes" for which the contract had expressly

<sup>1</sup> *Ib.*, at 405, 406. This test has been criticised as being too wide. See Pollock, 306; Salmond and Winfield, 308; McNair .91.

<sup>2</sup> [1916] 2 A.C., at 422.

<sup>3</sup> "... there can be no discharge by supervening impossibility if the express terms of the contract bind the parties to performance, notwithstanding that the supervening event may occur," said Viscount Simon, L.C., in *The Constantine Case* [1942] A.C. 154, 163.

<sup>4</sup> Frustration applies equally to a *time charterparty*: *The Bank Line Case* [1919] A.C. 435, 452-454, *per* Lord Sumner, *infra*, 497.

<sup>5</sup> But see *The Souler Case* [1917] 1 K.B., 222, 250, *per* A. T. Lawrence, J., *infra*, 488.

<sup>6</sup> "But suppose the facts had been slightly different," said Lord Dunedin, in *The Metropolitan Water Board Case* [1918] A.C. 119, 129: "Suppose the Government had taken the ship, and had said they would pay nothing . . . and then suppose that the owner had sued the charterers for the hire during the period while the Government kept the ship. What then? I may be wrong, but it seems to me that it would have fallen within the lines of *Horlock v. Beal* [1916] 1 A.C. 486."

provided: freight was to continue and the owners were to be free from liability. Lord Parker found it impossible to frame any implied condition without contradicting the express provisions and defeating the expressed intention of the parties.

(c) *Disappearance of Foundation*

The principle of the disappearance of the "foundation of what the parties are deemed to have had in contemplation," as laid down in the profound dissenting judgment of Viscount Haldane, has already been quoted.<sup>1</sup> With the foundation, "the contract itself has vanished." Where the interruption is "simply one of an interim character," the contract will be suspended:—

"The question must always turn mainly on the facts. But if the facts be such that it appears that the power of performance has been wholly swept away to such an extent that there is no longer in view a definite prospect of this power being restored, then the contract must be looked upon as being wholly dissolved, and the courts cannot take any course which would in reality impose new and different terms on the parties."<sup>2</sup>

The requisition enabled the Admiralty to use the steamer for purposes outside the contract, and for an indefinite time.

"It is impossible for any court to speculate as to the duration of the war . . ."<sup>3</sup>

The question must be decided *according to conditions prevailing in February, 1915.*

"The requisition was of a character so sweeping that I think the burden of showing that the purposes of the charter would continue to subsist concurrently with its operation rested on those who maintained the affirmative. *Prima facie* the entire basis of the contract, so far as concerned either performance in February, 1915, or performance at any calculable period in the future, seems to me to have been swept away . . ."<sup>4</sup>

If the *foundation* of the contract has gone, the *contract* has gone, and with it the "restraint of princes" clause introduced "for the very purpose of saving the foundation of the contract."<sup>5</sup>

### 3. INDEFINITE DETENTION OF SHIP ON "BALTIC ROUND"

Where a ship, under a charterparty which contemplated a commercial adventure, namely, a *Baltic round* (restraints of

<sup>1</sup> [1916] 2 A.C., at 406, 407; *supra*, 415.      <sup>2</sup> *Ib.*, at 407.

<sup>3</sup> *Ib.*, at 411. See also *per* Lord Shaw in *Horlock v. Beal* [1916] 1 A.C. 486, 507, 510; *per* Lush, J., in *Geipel v. Smith* (1872), L.R. 7 Q.B. 404, 414; cited, with approval, by Viscount Simon, L.C., in *The Fibrosa Case* [1943] A.C. 32, 41, *infra*.

<sup>4</sup> [1916] 2 A.C., at 411.

<sup>5</sup> See the review of the authorities in the dissenting speech of Lord Atkinson.



princes excepted), and contained a cancellation clause in the event of war, was, upon the outbreak of war, *indefinitely detained*, the commercial adventure was frustrated; the shipowners were not entitled to hire after detention: *The Souter Case*.<sup>1</sup>

In *The Souter Case*, the company, on 30th June, 1914, let the *Dunolly* for "one Baltic round" at £975 per calendar month until redelivery at a coal port in the United Kingdom. "'A Baltic round' ordinarily means a voyage to a Baltic port or ports with leave to call at a port or ports substantially on the route thither, and returning from the Baltic to a coal port here, with leave to call at a port or ports substantially on the route to such coal port."<sup>2</sup> Restraints of princes were excepted; no goods contraband of war were to be shipped; the steamer was not to be required to enter a port which was blockaded or where hostilities were in progress or prospect. No voyage involving risk of seizure or capture must be undertaken; *in the event of war affecting the working of the steamer*, the charterers were to have the option of cancelling the charter, or of insuring the steamer at their expense against all war risks. The charterers had the option to sublet and the option of continuing for "one further Baltic round" at £1,000 per month. On 4th July the *Dunolly* came on hire; she proceeded from Hull to Kronstadt, and on arrival discharged her cargo, and under a sub-charter by the defendants began to reload props. On 5th August she arrived at Finland; war having broken out, after the vessel was partly loaded the sub-charterers cancelled the charterparty. The plaintiffs declined to accept the notice of cancellation. After 1st August, the *Dunolly* was not allowed to leave for England; and her detention continued. Upon 10th August the export of wood goods was prohibited. The vessel was uninsurable against war risks. The owners claimed hire of the vessel from 4th August to 4th November.

Sankey, J., held that the doctrine of frustration of the adventure did not apply; the charter was a time charter, subject to "restraint of princes"; the common object was not frustrated. Secondly, since the sub-charterers could not hand over the vessel free of cargo and commitments, they could not rely on their notice of cancellation.<sup>3</sup> On appeal his decision was reversed.

In the *Weidner Hopkins Case* the charterparty was in similar terms. The *Auldmuir* was chartered for "two Baltic rounds." There was a provision for the cessation of hire on the happening of certain events which did not include "restraint of princes."

<sup>1</sup> *Scottish Navigation Co., Ltd. v. W. A. Souter & Co.; Admiral Shipping Co., Ltd. v. Weidner, Hopkins & Co.* [1917] 1 K.B. 222.

<sup>2</sup> Agreed between the parties; per Swinfen Eady, L.J., at 234.

<sup>3</sup> [1916] 1 K.B. 675, 681.

At the end of the first round the charterers had the *option of cancelling* the charter; *no notice of cancellation was given*. There was a pre-war sub-charterparty and—like the *Dunolly*—the vessel was subsequently detained by the Russian authorities. The owners claimed hire since 14th August; to this Bailhache, J., held that they were entitled.<sup>1</sup> He doubted whether “delay due to a cause contemplated and provided for by the charterparty, even though the delay itself is protracted beyond what might have been expected, ever amounts to frustration of the adventure . . . Again, delay to amount to frustration must prevent the fulfilment of the only objects for which both parties must have known that each of them entered into the contract.”<sup>2</sup> In a *voyage* charterparty, the charterer’s only object is to have his goods carried within a reasonable time and the owner’s only object is by such carriage to earn his freight. Undue delay defeats the objects of both. In a *time* charterparty, on the other hand, there was “no object in common contemplation between the parties except that the charterers should have the services of the steamship for some legitimate purpose within the terms of the charterparty.”<sup>3</sup> The option to cancel was the only remedy available.

#### (a) *Definition of Frustration by Delay*

The decision was reversed: it is not the law that the doctrine of frustration has no reference to a time charterparty.<sup>4</sup> Nevertheless, the “very careful” definition of the doctrine by Bailhache, J., was expressly approved by the Court of Appeal:

“The commercial frustration of an adventure by delay means . . . the happening of some unforeseen delay, without the fault of either party to a contract, of such a character as that by it the fulfilment of the contract in the only way in which fulfilment is contemplated and practicable is so inordinately postponed that its fulfilment when the delay is over will not accomplish the only object or objects which both parties to the contract must have known that each of them had in view at the time they made the contract, and for the accomplishment of which object or objects the contract was made.”<sup>5</sup>

<sup>1</sup> [1916] 1 K.B. 429, 437.

<sup>2</sup> See also *per* McCordie, J., in the *Larrinaga Case* (1922), 27 Com. Cas. 160, 174: “Put broadly, the condition is that a revolution of circumstance will dissolve the contract (by the operation of an implied covenant) if the change of facts be such as to destroy the mutually contemplated basis of the bargain.”

<sup>3</sup> [1916] 1 K.B., at 437, 438.

<sup>4</sup> See the *Bank Line Case* [1919] A.C. 435, 452–454, *per* Lord Sumner: “. . . time charters do not fall outside the rule” (at 454). *Infra*, 497.

<sup>5</sup> [1916] 1 K.B., at 436, 437; approved by Swinfen Eady and Bankes, L.JJ [1917] 1 K.B. 222, at 240, 242, 243.

(b) *Cancellation Clause and Frustration*

Swinfen Eady, L.J., said that in the *Souter Case*, the defendants were not entitled to give a notice of cancellation. Since no voyage involving the risk of capture or seizure could be undertaken, this precluded the vessel from sailing from Finland after 1st August. The cancellation clause provided for a *particular contingency*, namely, war—but at a time when the charterer *was able to take one of two courses*, viz., cancel, or insure against war risks. Here, the vessel was uninsurable; nor could the charterer “cancel” when the vessel had been *detained indefinitely*.

The charter was for “a particular marine adventure compendiously described as a ‘Baltic round’—a voyage to the Baltic and home . . .”; although payment was calculated by reference to the time, it was not for any definite time.<sup>1</sup> Both parties contemplated from the first “a mercantile adventure—a Baltic round”; the enforced delay due to the war was

“of such long and indefinite duration as completely to frustrate the adventure in a mercantile sense.”<sup>2</sup>

The contract was accordingly determined. The “Baltic round” was “quite impracticable in a commercial sense.”

“The present charterparty was “for a definite voyage out and home, the limits of which are completely defined by the mercantile language used, and which furnishes a standard for the computation of the time for which the charter is expected to continue.”<sup>3</sup>

A. T. Lawrence, J., who thought these were time charters not voyage charters—“puts the matter very usefully”<sup>4</sup>:—

“No such condition should be implied when it is possible to hold that reasonable men could have contemplated the circumstances as they exist and yet have entered into the bargain expressed in the document.”<sup>5</sup>

The ships were in the Baltic, unable to get away. A “Baltic round” was admittedly a matter of a few months; the war might last for many more months, or even years. A condition determining the charterparty must be implied

“if we are to attribute ordinary commercial reason to the parties to it.”<sup>6</sup>

The charterer pays hire and gets “no commercial advantage”; the shipowner keeps his ship available—at pre-war rates of hire.

“The subject of the contract is the services of the ship in accordance with the terms of the charterparty; the owner’s

<sup>1</sup> See the careful distinction drawn by Bankes, L.J., *ib.*, at 244–246.

<sup>2</sup> [1916] 1 K.B., at 236.

<sup>3</sup> [1917] 1 K.B., at 239.

<sup>4</sup> *Per* Lord Sumner, in *The Bank Line Case* [1919] A.C. 435, 460.

<sup>5</sup> [1917] 1 K.B., at 249.

<sup>6</sup> *Id.*, at 250. See also the exhaustive judgment of McCardie, J., in *Naylor, Penzon & Co., Ltd. v. Krainische Industrie Gesellschaft* [1918] 1 K.B. 331, 339.

object is, or should be, to afford those services, while the charterer's object is to enjoy them; it is true that the motive of each is money."<sup>1</sup>

The charterers were not entitled to lay up the *Auldmuir*, nor to send her to the Mediterranean instead of on a Baltic round.<sup>2</sup>

#### 4. REQUISITION AND FRUSTRATION; RULES

Where a ship, under a time charterparty which excepted restraint of princes but did not provide for cesser of hire in respect of interruption due to that exception, was requisitioned for an indefinite period by the Admiralty, the commercial adventure was frustrated; the charterers were not liable for hire after the requisition: *The Anglo-Northern Case*.<sup>3</sup>

By a charterparty dated October, 1915, to expire in November, 1916, the owners agreed to let the *Lowdale* for eleven or twelve calendar months (subsequently extended) at £363 5s. per month. There was an exception clause including restraint of princes, but no provision for cesser of hire. The steamer, unless lost, was to be redelivered, at the expiration of the charterparty. In July, 1916, the steamer was indefinitely requisitioned by the Admiralty and continued under that requisition until the end of the period of the charterparty and beyond; the Admiralty paid £1,529 10s. per month, but nothing to the charterers. The owners, after giving credit for the hire to be received from the Admiralty, claimed from the charterers £7,782 for hire from July to November, 1916.

Bailhache, J., said that the requisition was a restraint of princes and took the *Lowdale* entirely out of the control of owners and charterers. He thus summarised the law:—

(i) Commercial frustration applies to a time charterparty.<sup>4</sup>

(ii) The doctrine does not apply when the time charterer has the use of the vessel for some contractual purpose, even though this is not the particular purpose desired.

(iii) The doctrine does not apply "unless the owner is unable to give the time charterer the use of the vessel for any purpose whatever within the scope of the charterparty."

(iv) Whether the doctrine applies depends upon the circumstances of the case:

"The main consideration is the probable length of the

<sup>1</sup> See note 6, *supra*, p. 488.

<sup>2</sup> The Court of Appeal followed the reasoning of the minority in the *Tamplin Case* [1916] 2 A.C. 397; see *per* Bailhache, J.: [1917] 2 K.B. 85.

<sup>3</sup> *Anglo-Northern Trading Co., Ltd. v. Emlyn Jones and Williams* [1917] 2 K.B. 78; affirmed [1918] 1 K.B. 372, where Pickford, L.J., cited the careful summary of the rules formulated by Bailhache, J., in [1917] 2 K.B., at 83-85.

<sup>4</sup> See the *Bank Line Case* [1919] A.C. 435, 452-454, *per* Lord Sumner, *infra*, 497.

total deprivation of use of the vessel as compared with the unexpired duration of the charterparty."<sup>1</sup>

(v) In *time charterparties*, "the parties must have the right to claim that the charterparty is determined by frustration as soon as the event upon which the claim is based happens."

"The question will then be *what estimate* would a *reasonable man of business* take of the *probable length of the withdrawal of the vessel* from service with such materials as are before him, including, of course, the cause of the withdrawal, and *it will be immaterial whether his anticipation is justified or falsified by the event.*"<sup>2</sup>

The question was the implication of a frustration clause which would not conflict with the provisions of the contract.

"The general rule of law is, of course, that no term can be incorporated by implication into a contract which conflicts with some term expressed in the contract."<sup>3</sup>

The adventure was frustrated whether the position were considered as upon the date of the requisition, or was held in suspense until the termination of the charterparty.<sup>4</sup>

##### 5. BUILDING CONTRACT; INTERRUPTION DESTROYING IDENTITY

Where, by a pre-war contract, contractors agreed to construct and complete a reservoir within six years, *the engineer being empowered to extend the time if difficulties should unduly delay the work*, and where, by a notice lawfully given by the Minister of Munitions, the contractors were required to cease work, the contract, becoming for an indefinite period illegal to perform, was dissolved; the interruption made the contract when

<sup>1</sup> See the *Bank Line Case* [1919] A.C. 435, 454, 455, *per* Lord Sumner: "I agree on the importance of this feature, though it may not be the main and certainly is not the only matter to be considered. The probabilities as to the length of the deprivation and not the certainty arrived at after the event are also material."

<sup>2</sup> [1917] 2 K.B., at 83-85; author's italics. Bailhache, J., did not approve of the "wait and see" doctrine in *Andrew Millar & Co. v. Taylor & Co.* [1916] 1 K.B. 402.

See Williston, s. 1958; *Restatement*, s. 466; McNair, 161-166.

He propounds the following test: "Would a reasonable man in the position of the party alleging frustration, after taking all reasonable steps to ascertain the facts then available, and without snapping at the opportunity of extricating himself from the contract, come to the conclusion that the interruption was of such a character and was likely to last so long that the performance or further performance of the contract would really amount to the performance of a new contract? If so, there is frustration . . . Moreover, the court will not let him suffer for a determination thus reached if subsequent unexpected events show that he was unduly pessimistic in his forecast" (165, 166). See also *Poussard v. Spiers & Pond* (1876), 1 Q.B.D. 410, 415, *per* Blackburn, J.

<sup>3</sup> [1917] 2 K.B., at 86.

<sup>4</sup> Affirmed [1918] 1 K.B. 372, 377, 378. Pickford, L.J., described these propositions as "a very clear, careful and correct summary of the law."

resumed, a different contract from the contract when interrupted: *The Metropolitan Water Board Case*.<sup>1</sup>

The contract was made in July, 1914; the agreed price was £673,000. Time was to be considered "as of the essence of the contract on the part of the contractor." The Water Board were given a limited property in the plant provided. In August, 1914, work began. By the beginning of 1916, owing to the difficulty of procuring labour, inadequate progress had been made; to finish in the contractual time became impracticable. In February, the contractors were ordered to cease work and to hold at the disposal of the Minister their labour and their plant (of which £100,000 had already been provided). They accordingly sold a considerable quantity of the plant and, on behalf of the Minister, received £46,000. The Water Board brought an action claiming that the contract was binding. Bray, J., held that the contract was not terminated but merely suspended.

On appeal it was argued for the contractors that in the event of the withdrawal of the prohibition, an entirely different contract would arise. To proceed with the contract had for an indefinite period been rendered illegal; £180,000 had been expended; the contractors were already out of pocket to the extent of £100,000, which was indefinitely tied up.

The Water Board contended that it was only a question of delay and extra expense, both of which could be dealt with under the clause providing for difficulties and delays due to specified causes. The contract was merely suspended. The parties must be taken to have contemplated the risks of war.

#### (a) *Illegality of Performance*

Lord Cozens-Hardy, M.R., said that "the continuance of war has in many cases been held to be too uncertain to be regarded as temporary." The parties could not have contemplated the emergency legislation evoked by the war. Nor did the contractual provision for *specified* difficulties and delays extend to the case of illegality.

"The mere circumstance that the contractors might lose

<sup>1</sup> *Metropolitan Water Board v. Dick, Kerr & Co., Ltd.* [1917] 2 K.B. 1; [1918] A.C. 119. See also *Kursell v. Timber Operators and Contractors* [1927] 1 K.B. 298. A contract was made in 1920 to sell all the merchantable timber growing in a certain forest in Latvia. The purchasers were to have fifteen years to cut the timber. In 1920, the Latvian Government expropriated the forest, and for five years it had been illegal to perform the contract; the obstacle continued. It was held that the property in the timber had not passed to the purchasers; but Scrutton, L.J., said that even if the property had passed, so much remained to be done under the contract that the doctrine of frustration would apply (at 312).

The prevention was "sufficiently permanent to defeat the adventure and make it a different adventure from that which the parties contemplated."

<sup>2</sup> [1917] 2 K.B., at 21. See *per* Lush, J., in *Geipel v. Smith* (1872), L.R. 7 Q.B. 404, 414; *per* Lord Shaw in *Horlock v. Beal* [1916] 1 A.C. 486, 507, 510; *per* Viscount Haldane in the *Tamplin Case* [1916] 2 A.C. 397, 411; and *per* Viscount Simon, L.C., in the *Fibrosa Case* [1943] A.C. 32, 41.

money would not suffice to terminate the contract.<sup>1</sup> I base my judgment on the view that it was the manifest intention of the parties that there should be freedom of action on the part of both parties, and that there should be read into the contract an implied term or condition that the liability of performance should cease in the event of the Executive Government, acting lawfully and within their powers, making performance of the contract illegal and impossible.”<sup>2</sup>

(b) *Of Uncertain Duration*

Warrington, L.J., pointed out that *temporary illegality* does not determine a contract.<sup>3</sup> A clause suspending a contract, however, in the event of specified delays

“will not prevent it from having the effect of dissolving the contract if it is of such a nature as substantially to frustrate the objects of the parties or to render their obligations substantially different from those which they contemplated on entering into the contract.”<sup>4</sup>

The action of the Ministry was not temporary; it was likely to continue for the duration of the war, “a period of uncertain duration.” The parties must have contracted on the basis that the contractors would be free to perform their obligations without interference by the Executive:—

“The action of the Ministry has deprived them of that freedom and for an indefinite time, and . . . therefore, the condition is not fulfilled, and the contract is dissolved.”<sup>5</sup>

Though the construction may be “physically possible,” and by expenditure “commercially practicable,”

“the construction would take place under such altered circumstances that it would not . . . be the performance of this contract.”<sup>6</sup>

The performance of their obligations “*depended essentially*” upon their continued power to use the plant; the plant had been removed and was no longer available.<sup>7</sup>

Both the direction of the Ministry and the removal of the plant dissolved the contract.

And Scrutton, L.J., observed:—

“I cannot believe that a twenty years’ war (*absit omen*) and twenty years’ illegality would find the parties bound at

<sup>1</sup> See per Swinfen Eady, L.J., in *Bolckow, Vaughan & Co. v. Compania Minera de Sierra Minera* (1916), 85 L.J.K.B. 1776; (1917), 86 L.J.K.B. 439, 444; and per McCordie, J., in the *Blackburn Bobbin Case* [1918] 1 K.B. 540, 546; *infra*. See also per Scrutton, L.J., in the *Comptoir Case* [1920] 1 K.B. 868, 902; *infra*. And see Williston, s. 1963; *Restatement*, s. 467.

<sup>2</sup> [1917] 2 K.B., at 22.

<sup>3</sup> [1917] 2 K.B., at 24, citing *The Millar Case* [1916] 1 K.B. 402.

<sup>4</sup> *Ib.*, at 24, citing *Baily v. De Crespigny* (1869), L.R. 4 Q.B. 180, 185.

<sup>5</sup> [1917] 2 K.B., at 26.

<sup>6</sup> *Ib.*, at 26. See also the observations of McCordie, J., in the *Naylor, Benson Case* [1918] 1 K.B. 331, 339.

<sup>7</sup> [1917] 2 K.B., at 27.

the end of the war to resume a long interrupted adventure. In my view it was a condition of the validity of this contract that it should be legal and therefore possible to work on the site continuously subject to minor interruptions, and therefore an illegality of performance in consequence of war, which must be treated as more than temporary and of uncertain duration, would abrogate the contract and release the parties."<sup>1</sup>

It was clear that

"a period of construction, with a long and indefinite delay in the middle of it, followed by the necessity of fresh provision of plant and reconstruction of work, is not the adventure the parties contemplated."<sup>2</sup>

In the House of Lords<sup>3</sup> the Water Board contended (*inter alia*) that a contract for the execution of *public* works of a permanent character was on a different footing from an ordinary commercial contract. Lord Finlay, L.C., brushed this argument aside; although the works were to last for centuries, the construction was to take six years only.

### (c) Identity of Work Destroyed

"To make what I may call a clean case of illegality," said Lord Dunedin, "the illegality must be permanent." The test which he laid down to determine the effect of an "interruption" has since been regarded as authoritative:—

"An interruption may be so long as to destroy the identity of the work or service, when resumed, with the work or service when interrupted."<sup>4</sup>

Apart from the delay, the *action as to the plant* prevented the contract from being the same as it was:—

"The contract when resumed would be a contract under different conditions from those which existed when the contract was begun . . ."<sup>5</sup>

The contractual clause relating to delay applied to "more or less temporary difficulties" only, not to

"a set of occurrences which would make the contract when resumed a really different contract from the contract when broken off."<sup>6</sup>

<sup>1</sup> [1917] 2 K.B., at 35, 36.

<sup>2</sup> *Ib.*, at 36.

<sup>3</sup> [1918] A.C. 119.

<sup>4</sup> [1918] A.C., at 128. See *The Bank Lane Case* [1919] A.C. 435, 460; *infra*. See Lord Wark's gloss, in *The Denny Mott Case* [1943] S.C. 328. The test is not exclusive: Frustration "does not depend simply on the consideration that when the interruption ceases, conditions of performance may be different, though that may also be worth dwelling on in certain cases . . ." (*per* Lord Wright, in *The Denny Mott Case* [1944] A.C. 285, 278).

Both Viscount Simon, L.C., and Lord Wright apply this test in *The Cricklewood Case* (1945), 61 T.L.R. 202, 204, 206, where an interruption in building owing to the present war had not destroyed "the identity of the arrangement," or made it unreasonable to carry out the ninety-nine years building lease as soon as the interruption in building was over. *Infra*, 572.

<sup>5</sup> *Ib.*, at 128, 129; L.R. 10 C.P. 125.

<sup>6</sup> *Ib.*, at 130.



Lord Atkinson declared that "difficulties arising from the exercise by the executive of their unprecedented and arbitrary powers . . . could never have been within the contemplation of the parties at the time they entered into the contract."<sup>1</sup>

"The continued existence of [that] freedom of action till the contract was performed must have been in their contemplation as the very foundation of it at the time they entered into it."<sup>2</sup>

(d) *Resumption a Different Contract*

The question depends, said Lord Parmoor, upon "the ascertainment of the true meaning of the bargain between the parties."

"If . . . the contract contains no provision for such a contingency as the interference of the Legislature, then the court must determine whether this contingency is of such a character that it can reasonably be implied to have been in the contemplation of the parties at the date when the contract was made. Care must always be taken not to imply a condition which would be inconsistent with the expressed intention of the parties."<sup>3</sup>

For the present contingency, "a mere extension of time at the discretion of the engineer is not in any sense an appropriate remedy."<sup>4</sup> What is "the real meaning and purport of such a contract"?

"It is that works shall be carried out at prices fixed with reference to the then outlook for cost of labour, plant and materials, spread over a defined limit of time, which could not fail to affect materially the figures inserted by any contractor in sending in his tender."

If, in the future, the works are executed, that will be

"under a different contract based on changed considerations."<sup>5</sup>

<sup>1</sup> [1918] A.C. 119, at 134, 135.

<sup>2</sup> *Ib.*, at 135.

<sup>3</sup> *Ib.*, at 137. See *per* Lord Parker in *The Tamplin Case* [1916] 2 A.C. 397, 422, *supra*; and *per* Viscount Simon, L.C., in *The Constantine Case* [1942] A.C. 154.

<sup>4</sup> *Ib.*, at 138. See *per* Earl Loreburn in *The Tamplin Case* [1916] 2 A.C. 397, 404; and *per* Lord Wright, in *The Constantine Case* [1942] A.C. 154, 187.

<sup>5</sup> [1918] A.C. 119, at 139. The decision was followed in *The Federal Steam Navigation Company, Ltd. v. Sir Raylton Dixon & Co., Ltd.* (1919), 1 Ll. L. Rep. 63. In January, 1915, a steamer was agreed to be built for £127,500, delivery in December. In February, 1915, the Admiralty took over the control of the shipyard, and in June, 1916, the respondents were directed to devote their resources to merchant shipping. A priority certificate was received in December, 1916, the appellants agreeing to pay an additional £74,000, but in February, 1917, the Board of Trade refused facilities for building the contract vessel "at present." The appellants, therefore, claimed to be free from the duty to pay the additional £74,000, saying that it was an express term of the agreement to pay the increased price, that the building should be proceeded with immediately. The respondents, by counter-claim, sought a declaration that the agreement subsisted. And so

## 6. IDENTITY OF CHARTERED SERVICE DESTROYED

Where the requisitioning of a ship "destroyed the identity of the chartered service and made the [time] charter as a matter of business a totally different thing, [and] hung up the performance for a time, that was wholly indefinite and probably long," the contract was dissolved: *The Bank Line Case*.<sup>1</sup>

In February, 1915, the owners of the *Quito* entered into a charterparty for twelve calendar months from the time when the vessel was placed at the charterers' disposal, ready to load at a coal port in the United Kingdom, to be employed in trade between safe ports within certain countries. The hire was £2,919 per calendar month. Loss or damage, if it arose, *inter alia*, from restraint of princes, was absolutely excepted. By clause 26, the steamer should be delivered not before 1st April. Should the steamer not have been delivered on 30th April, the charterers had the option to cancel. If, "through unforeseen circumstances," the steamer could not be delivered by the cancelling date, the charterers, if required, should declare within a specified period after receiving notice, whether they would cancel or take delivery. By clause 31, the charterers had the option to cancel should the steamer during the charter be "commandeered." The vessel was not ready by 30th April, the cancelling date, but the charterers did not cancel. On 11th May, while preparing for service, she was requisitioned by the Government. Until June, charterers and owners made unsuccessful efforts to get her released. Between June and September no further communication passed between the parties, when the charterers, who had heard that the owners were selling the *Quito*, called on them to deliver her. The owners replied that the charter had become inoperative. In

Bailhache, J., the Court of Appeal, and the House of Lords held. "One must examine," said Birkenhead, L.C., "first, the degree of interference, and, secondly, its duration. It is . . . difficult, and perhaps impossible, to lay down any general conclusion, because in these matters it must always be a matter of fact" (*ib.*, at 65). The nature of the control exercised by the Government "completely transformed the nature of the contract and the ambit of the obligation . . ." (*ib.*, at 66).

The Court of Appeal followed this decision in *Woodfield Steam Shipping Company, Ltd. v. J. L. Thompson & Sons, Ltd.* (1919), 1 Ll. L. Rep. 126. See also the judgment of Bailhache, J., in *Fisher, Renwick & Co. v. Tyne Iron Shipbuilding Company, Ltd.* (1920), 3 Ll. L. Rep. 201, 253.

<sup>1</sup> *Bank Line, Ltd. v. Arthur Capel & Co.* [1919] A.C. 435, 460, per Lord Sumner, adopting the expression used by Lord Dunedin in *The Metropolitan Water Board Case* [1918] A.C. 119, 128; *supra*, 493.

See, on voyage charterparty, *The Texas Company v. Hogarth Shipping Company, Ltd.* (1920), 256 U.S. 619, 631, per Van Devanter, J., where a ship was requisitioned for a period likely to extend beyond the time for the charter voyage. Compliance with the charterparty became impossible by act of State; the event was unanticipated and the risk was not laid on either party. There was "an implied condition that, if before the time for the voyage the ship was rendered unavailable by such a supervening act as the requisition, the contract should be at an end and the parties absolved from liability under it."

August the owners had accepted an offer to buy the ship, subject to release from requisition. Early in September, upon the owners providing a substitute, the ship was released.

The charterers sued for a declaration that the charterparty was not dissolved, and claimed damages for non-delivery. Rowlatt, J., held that the charterparty was at an end; the Court of Appeal reversed his decision (Pickford, Warrington, L.J.J.; Scrutton, L.J., dissenting) and gave judgment for the charterers for £13,344, the damages provisionally assessed by the judge. The House of Lords restored the decision of Rowlatt, J. (Lord Finlay, L.C., Lord Shaw, Lord Sumner, Lord Wrenbury; Viscount Haldane<sup>1</sup> dissenting on the correct inference from the facts).

"A charter for twelve months from April," observed Lord Finlay, L.C., "is clearly very different from a charter for twelve months from September." The adventure is

"entirely frustrated and the owner, when required to enter into a charter so different from that for which he had contracted, is entitled to say '*non haec in foedera veni*'."<sup>2</sup>

The luminous speech of Lord Sumner is the *locus classicus* upon the principle of frustration. The tests used in different cases are critically surveyed; with caustic clarity a rational exposition of the rule emerges.<sup>3</sup>

In substance, though not in form, it was "an April to April charter"; upon release from the Admiralty, only a September to September hiring would have been possible. During the *Quito's* service for the Admiralty the charterers would not know when, if ever, she would be available; the position of the owners also would be "one of indecision." "These uncertainties in commerce are very serious."<sup>4</sup>

#### (a) "Self-induced Frustration"

At first, the owners had intimated to the Admiralty that of three ships the *Quito* was the one they preferred to surrender; no point, however, was made of this in the courts below. Lord Sumner paused to point out that frustration must arise "without blame or fault on either side."

"Reliance cannot be placed on a self-induced frustration; indeed, such conduct might give the other party the option to treat the contract as repudiated."<sup>5</sup>

<sup>1</sup> See his statement of the principle, at 444, 445.

<sup>2</sup> [1919] A.C., at 442.

<sup>3</sup> *Ib.*, at 450-460.

<sup>4</sup> *Ib.*, at 451.

<sup>5</sup> See *Maritime National Fish, Ltd. v. Ocean Trawlers, Ltd.* [1935] A.C. 524, 530, 531, per Lord Wright, following this passage. And see per Lord Blackburn in *Dahl v. Nelson, Donkin & Co.* (1881), 7 App. Cas. 38, 53. Williston, s. 1959.

See also *The Constantine Case* [1942] A.C. 154, 166, per Viscount Simon, L.C.: "Self-induced frustration . . . involves deliberate choice . . . a man cannot ask to be excused by reason of frustration if he has purposely so acted as to bring it about"; and see per Viscount Maugham, *ib.*, at 171; per Lord Russell, at 179; per Lord Wright, at 189-191; and per Lord Porter, at 199, 200.

a broad arbitration clause."<sup>1</sup> The majority in the *frustration* case relied upon Lord Sumner's decision in the *Hirji Mulji Case*,<sup>2</sup> which, in the opinion of the writer of the *Note*, is divested of authority by the recent disapproval in the House of Lords.<sup>3</sup>

#### 9. FRUSTRATING EVENT, IN PARTIES' CONTEMPLATION

"If the true foundation of the doctrine is that once the subject-matter of the contract is destroyed, or the existence of a certain state of facts has come to an end, the contract is at an end, that result follows whether or not the event causing it was contemplated by the parties."

*unless they have made a provision in the contract dealing with the specific contingency: The Tatem Case.*<sup>4</sup>

By a charterparty made on 25th June, 1937, during the Spanish Civil War, the owners chartered the *Molton* to an agent of the Republican Government of Spain, for thirty days from 1st July, to be employed between "North Spain (Government ports) and French Bay ports for the evacuation of civil population from North Spain." The charterers were to pay £250 per day until redelivery: should the steamer be lost, hire would cease from the date of loss.

On 1st July, the *Molton* was delivered to the charterer at Santander. She made one voyage, taking refugees to a French port, and returned for more. On 14th July she was seized by a Nationalist ship, taken to Bilbao and kept until 7th September, when she was released. She then went to Bordeaux and on 11th September was redelivered to the owners. The charterer had paid in advance the agreed hire up to 31st July, but on 18th August he wrote declining any further concern. The owners claimed hire at the rate of £250 per day from 1st August to 11th September. The charterer contended that upon seizure of the ship the adventure was frustrated.

It was argued for the owners that the doctrine of frustration applied only where the event was not contemplated by the parties: here, reasonable men could have contemplated the event and yet have entered into the bargain. Here, the seizure of the vessel was clearly contemplated: the risk was well known, and, indeed, was reflected in the rate of hire.

The charterer contended that the fact that the event is contemplated or known at the time when the contract is made does not prevent the doctrine from applying.

<sup>1</sup> 43 Columbia Law Review, at 514, citing *Heyman v. Darwins, Ltd.* [1942] A.C. 356, 366, per Viscount Simon, L.C. The reports of this case reached the U.S. only after the instant cases had been decided: *ib.*, 515, note 38.

<sup>2</sup> [1926] A.C. 494.

<sup>3</sup> See note 3 and Williston, vol. 3, s. 5383, cited *ib.*, 514.

<sup>4</sup> *Tatem v. Gamboa* [1939] 1 K.B. 132, 138, per Goddard, J. (as he then was). See *Note* by J. Unger (1938), 2 Mod. L. Rev. 233-236.

(a) *Disappearance of Foundation of Contract*

Goddard, J., held that on the evidence a risk of the kind of seizure that took place, and a long detention, was *not* contemplated by the parties. But even if the parties did contemplate the seizure that had happened, this question did not arise.

To reconcile all the judgments and speeches was difficult: he preferred the principle laid down by Viscount Haldane in the *Tamplin Case*,<sup>1</sup> and quoted with approval by Lord Sumner in the *Lacrinaga Case*.<sup>2</sup> The present contract concerned a particular ship, a *certum corpus*, chartered for a particular service. Viscount Haldane described a frustrating event as

"of a character and extent so sweeping that the foundation of what the parties are deemed to have had in contemplation has disappeared, and the contract itself has vanished with that foundation."

That seemed "the surest ground on which to rest the doctrine of frustration, and I prefer it to founding it on implied terms."<sup>3</sup>

(b) *Unless Contrary Intention Plain*

Thus, whether the circumstances were "foreseen," or not, makes very little difference. Goddard, J., continued:—

"If the foundation of the contract goes, it goes whether or not the parties have made a provision for it."<sup>4</sup>

Thus, "unforeseen circumstances"—in relation to frustration—really means circumstances "*unprovided for*" by the contract.<sup>5</sup> It follows that—

"*unless the contrary intention is made plain, the law imposes this doctrine of frustration in the events which have been described.*"<sup>6</sup>

"If the foundation of the contract goes, either by the destruction of the subject-matter or by reason of such long interruption or delay that the performance is really in effect that of a different contract, and the parties have not provided what in that event is to happen, the performance of the contract is to be regarded as frustrated."<sup>6</sup>

In the *Bank Line Case*,<sup>7</sup> the charterparty provided for requisition, and gave the charterers an option to cancel if the steamer should be commandeered: that did not prevent frustration from applying. The parties must have had before them the possibility or the probability of requisition.

"Although the parties may have had or must be deemed

<sup>1</sup> [1916] 2 A.C. 397, 406, 407.

<sup>2</sup> (1923), 37 T.L.R. 316, 321.

<sup>3</sup> [1939] 1 K.B., at 137.

<sup>4</sup> [1939] 1 K.B., at 138.

<sup>5</sup> "Unforeseen circumstances" means circumstances for which the written contract makes no [quære full] provision": Scrutton, 112, note (kk).

<sup>6</sup> [1939] 1 K.B., at 139; author's italics,    <sup>7</sup> [1919] A.C. 435.

to have had the matter in contemplation, the doctrine of frustration is not prevented from applying."<sup>1</sup>

In the present case, the charter was for one month only—a *time* charter—and at a *very high* rate of freight. The limits of trade were very narrow and the specific purpose was made plain: the evacuation of the civil population from North Spain.

"The foundation of the contract was destroyed as soon as the insurgent war vessel had seized the ship, which it did after it performed one voyage, and when the period of the charter had but half expired."<sup>2</sup>

## B. DURING THE PRESENT WAR

### 1. ADVERTISING CONTRACT: EXPRESS PROVISION

Where advertising contractors, under a contract for three years, made in April, 1939, with a local authority, were entitled to display advertisements on bins attached to lamp-posts, and, by reason of a statutory order made in June, 1940, the local authority obliterated from an advertisement so displayed the name of the advertiser and the name of the town, the contract was no longer capable of being performed in the manner contemplated by the parties, and was at an end.<sup>3</sup>

The advertisement

"Carbis Bay Garage, Ltd.  
Repairs & Service  
'Phone St. Ives 100"

had been exhibited until August, 1940. After the local authority had painted out the offending words, what remained was:—

"Garage Ltd.  
Repairs & Service  
'Phone 100."

By clause 3 in the contract, "from any cause whatever should the advertisement cease to be displayed," the advertiser must be charged *pro rata* for the period during which the advertisement had been displayed.

"I think that, when it was no longer possible to display the advertisement, there was a frustration of the contract."<sup>4</sup>

<sup>1</sup> [1939] 1 K.B., at 140. In *The Penelope* [1928] P. 180, a commercial adventure was held to be frustrated owing to the *General Coal Strike*. Although the coal strike was "not unforeseen," the doctrine of frustration applied (at 196). "What was unforeseen, however, was the total impossibility of any export of coal from the South Wales ports for a period of half a year and upwards. Was this a delay contemplated by the parties?" (at 197). The *contemplated delay* was "an interruption of work by a local withdrawal of labour. Such an interruption is a trivial occurrence compared with the events in question."

<sup>2</sup> [1939] 1 K.B., at 140.

<sup>3</sup> *White & Carter, Ltd. v. Carbis Bay Garage, Ltd.* (1941), 2 All E.R. 633.

<sup>4</sup> *Ib.*, at 635, *per MacKinnon, L.J.*

This followed from the *express* term; implied terms need not be considered.

## 2. DETENTION OF ALIEN ENEMY ; CONTRACT OF SERVICE DISSOLVED

Where, in June, 1940, a German refugee employed as a full-time school medical officer was *detained* under Defence Reg. 18B, "the business purpose of the contract" was frustrated and no further salary accrued: *Unger v. Preston Corporation*.<sup>1</sup>

In 1938, U had been appointed assistant school medical officer, full-time, at a salary of £500, rising to £700 per annum. The engagement was terminable at three months' notice. Detained as an enemy alien in June, 1940, he was an alien in category C, a refugee from Nazi oppression and friendly to England. The Preston Corporation wrote to his solicitors giving him three months' notice terminating in January, 1941. Released in March, 1941, he issued a writ, claiming £306, being seven months' salary, and claimed a return of his contributions to the superannuation fund. That he was entitled to the return of those contributions was admitted, but the corporation argued that "on his detention the object of the contract was frustrated."

And so, quoting from the opinions in *The Constantine Case*<sup>2</sup> and in *Marshall v. Glanville*,<sup>3</sup> Cassels, J., held.

Internment was "more than a mere temporary interruption."<sup>4</sup>

## 3. ELECTRICITY FOR PUBLIC LIGHTING ; ABATEMENT CLAUSE

Where, in consideration of a fixed quarterly payment, an electricity company had agreed to supply to a municipal council *current and other services for the lighting of streets*, and under the contracts the company was not liable for default due to specified events and to "any other unavoidable cause over which the company has no control," but upon "curtailment of the supply" for any such cause *payments should proportionately abate*, the *prohibition of public lighting by statutory orders* caused a "curtailment of supply" by such unavoidable cause and, until the supply was renewed, the council was completely exonerated from liability to pay: *The Egham Case*.<sup>5</sup>

<sup>1</sup> (1942), 1 All E.R. 200, *per* Cassels, J. See *Note*, (Glanville Williams, in (1943), 6 Mod. L. Rev. 160-163.

<sup>2</sup> [1942] A.C. 154, 163, *per* Viscount Simon, L.C.

<sup>3</sup> [1917] 2 K.B. 87, 91, *per* McCardie, J.: "Here the parties clearly made their bargain on the footing that it should continue lawful for the plaintiff to render and for the defendants to accept his services."

<sup>4</sup> As in *Nordman v. Rayner & Sturgess* (1916), 33 T.L.R. 87, where N was interned as an Alsatian, but released after a month. The contract was for a preliminary period of twelve months, and if not terminated would run for five years more.

<sup>5</sup> *Egham & Staines Electricity Co., Ltd. v. Egham Urban District Council* (1944), 1 All E.R. 107, affirming decision of the Court of Appeal (1942), 2 All E.R. 154, which had reversed the judgment of Cassels, J. (1942), 1 All E.R. 674.

Three agreements were made—in 1933, 1935 and 1937—to secure the lighting of the streets in the district of Egham. The company agreed to *supply and maintain*, and the council agreed to take, “an efficient and adequate supply of electrical energy.” The company were bound to replace and repair damaged lamps, to make a nightly inspection, to paint standards, to replace broken lamps and to maintain all lamps in a continuous and efficient state of repair and function. By clause 15 :—

“No default by the company under this agreement shall render the company liable in damages if and so far as such default shall arise or be occasioned by reason of fire frost accident strikes lock-outs or combination of workmen or cessation or restriction of work by workmen or from any other unavoidable cause over which the company has no control. Provided always that all payments under this agreement by the council shall abate in the same proportion as the supply shall be curtailed by reason of any event provided for in this clause.”

The company were bound to turn the lights on and off at specified times. From 1st September, 1939, the display of lights in streets became unlawful, and the company, removing the time switches, made the lamps inoperative.

The council contended that the supply was curtailed for an “unavoidable cause” within clause 15 and that, curtailment being total, abatement of payments should also be total. This case differed from *The Letston Case*, where the parties had made no provision for the event which had happened.<sup>1</sup> The company claimed £3,590. They were continuing to fulfil the undertaking concerning provision, maintenance, repair and painting, and had made a monthly inspection. They were not in default; it was the lighting by the council that had been prevented. The first contract still prevailed; the second and third contracts did not expire until 1950 and 1952.

Cassels, J., held that clause 15 did not cover the circumstances. The company had performed their part of the contract. The lighting restrictions affected the council only, and that, in *one part* of the contract, viz., in the taking from the company of electrical energy which was available.<sup>2</sup>

This judgment was reversed by the Court of Appeal. MacKinnon, L.J., said that since it became illegal for the company to switch on the lights and by order of the Minister they were prevented from doing so, they had not fulfilled their contract.<sup>3</sup> Liability created by order of the Minister was “an unavoidable cause over which the company has no control.”<sup>4</sup>

<sup>1</sup> [1916] 2 K.B. 428; *infra*, 541–543.

<sup>2</sup> (1942), 1 All E.R., at 678.

<sup>3</sup> (1942), 2 All E.R., at 156.

<sup>4</sup> *Ib.*, at 157.



Since the supply was *completely* curtailed, the obligation to pay came to an end.

The House of Lords affirmed this decision.

"The contract was for a supply for lighting the lamps; it was not a contract to supply merely electrical energy, but a contract to supply electric lighting."<sup>1</sup>

Moreover, curtailment of supply occurred by reason of the lighting restriction orders—an "unavoidable cause" over which the company had "no control." Since the supply ceased *in toto*, the council, until the supply was renewed, were completely exonerated from payment.

#### 4. TIMBER AGREEMENT; OPTION TO BUY YARD, UNSEVERABLE

Where, under an *agreement* made in 1929, to which no duration was fixed, one timber merchant had agreed to buy (at prices under which costs were variable and rate of profit fixed), all his supply of certain timber from another timber merchant and importer (so far as his stocks would permit), and, in order to enable this trading agreement to be carried out, had agreed to let his timber yard to the other *with* an option to purchase at a specified price or to take the yard on long lease at a specified rent, *if the "foregoing trading agreement" were terminated as provided*, and in September, 1939, owing to Statutory Orders, trading between the parties had ceased, and where, in July, 1941, the lessee gave notice to terminate the agreement and to exercise the option to purchase, this agreement formed a single contract; upon frustration of its commercial purpose before July, 1941, it was dissolved: *The Denny Mott Case*.<sup>2</sup>

In Lord Robertson's<sup>2</sup> opinion, the "purchase agreement" was severable from the "trading agreement." Upon the frustration, by *vis major*, of its commercial purpose, the trading agreement had been terminated: the option to purchase, which was not "ancillary to" the trading agreement, remained open.<sup>3</sup> He dismissed an action by the lessors for a declaration that the minute of agreement had become "inoperative."

The Second Division recalled the interlocutor of the Lord Ordinary, and found that the whole agreement had been terminated before July, 1941, and continued the case. This decision the House of Lords affirmed.

<sup>1</sup> (1944), 1 All E.R., at 109, *per* Lord Russell of Killowen.

Contrast *Williams v. Mercer* (1940), 3 All E.R. 292, 295 (*per* Goddard, L.J.). The Lighting (Restrictions) Order, 1939 (which prohibited *illumination* of advertising signs), did not permit the lessee to determine the agreement under a clause permitting such determination if the local authority required the sign to be "*altered or amended*."

<sup>2</sup> *Denny, Mott & Dickson, Ltd. v. James B. Fraser & Company, Ltd.* [1944] A.C. 265, affirming *James B. Fraser & Co., Ltd. v. Denny, Mott & Dickson, Ltd.* [1943] S.C. 293.

<sup>3</sup> *Ib.*, at 303, 304.

## (a) "A Single, Indivisible Agreement"

"In form and substance," said Lord Justice Clerk (Cooper),<sup>1</sup> "it is one contract." The "controlling purpose was the establishment and regulation of a trading relationship between the parties in the sale and purchase of imported timber for an indefinite period"; the provisions concerning the timber-yard at a timber-importing port, were "ancillary." There was an implied duty on the defenders to take reasonable steps to acquire and to maintain stocks.<sup>2</sup>

"... the agreement had as its indispensable foundation a common commercial purpose or object in the pursuit of which both parties had rights, interests and duties, viz., the carrying on for an indefinite period on an agreed basis of a more or less continuous course of dealing in imported timber between the defenders as importers and the pursuers as merchants and users. . . . In my view, the agreement was one which, from a practical point of view, depended for its existence upon the availability of a substantially steady supply of imported timber, and a free market for its disposal."<sup>3</sup>

When parties in a single agreement embody "a plurality of stipulations," the agreement is *prima facie* a unit, and the stipulations are "mutually independent."<sup>4</sup>

The supply of imported timber and the free market for its disposal came to an end shortly after the outbreak of war.

"The consequence of frustration must be termination of an agreement unless the parties have plainly evinced their intention that, on the occurrence of the event which destroys the foundation of the contract, some other consequence than frustration is then to ensue."<sup>5</sup>

This agreement, contemplating and requiring "more or less continuous common effort" and "the continued existence of freedom of action,"<sup>6</sup> cannot survive "the indefinite and already prolonged interruption of both these elements."<sup>7</sup>

<sup>1</sup> [1943] S.C., at 308.

<sup>2</sup> *Ib.*, at 310. See also *per* Lord Wark (at 328) and *per* Lord Jamieson (at 331).

<sup>3</sup> *Ib.*, at 310.

<sup>4</sup> *Ib.*, at 311, referring to Glog on Contract (2nd ed.), 592, 595. The passage at 592 is cited in the dissenting judgment of Lord Jamieson (*ib.*, at 334).

<sup>5</sup> *Ib.*, at 312. See *The Fibrosa Case* [1943] A.C. 32, 40, *per* Viscount Simon, L.C.:-

"The principle is that where supervening events, not due to the default of either party, render the performance of a contract indefinitely impossible, and there is no undertaking to be bound in any event, frustration ensues, even though the parties may have expressly provided for the case of a limited interruption."

<sup>6</sup> *Per* Lord Atkinson, *The Metropolitan Water Board Case* [1918] A.C. 119, 135.

<sup>7</sup> [1943] S.C., at 313, *per* Lord Justice Clerk (Cooper).

Under the agreement the option arose only when the trading agreement was "in active life" and in the event of the agreement being terminated by either party in the manner provided. Here, the agreement had been terminated, not by either party or in the manner provided, but by the operation of frustration at a time when trading relations between the parties had been totally stopped for three years and must remain stopped, indefinitely.

"This is to substitute a different bargain for that to which the parties agreed and to remodel the contract."<sup>1</sup>

The option was

"an integral part of a single indivisible agreement."<sup>1</sup>

There is no room for the inquiry what the parties would have agreed if they had contemplated frustration. "The law supplies the only answer."<sup>2</sup>

(b) *All Stipulations go, when Foundation gone*

Nor is the doctrine of frustration excluded merely because some stipulations in a contract are still capable of fulfilment:

"The inquiry is directed, not to each of the detailed stipulations of a contract, but to its 'main basis' or 'foundation' or 'substratum' or 'commercial or mutual purpose.' Moreover, it is tacitly assumed . . . that a commercial contract has only one such 'main basis' or 'foundation' . . . but the assumption has a wider validity, for a contract which presents the appearance of being a single contract but on examination reveals two such 'main bases' or 'foundations' must be not one contract but two, and will usually present ample indication of duality and severability."<sup>3</sup>

The present contract had but one foundation. this foundation had vanished, and with it *all* its stipulations.<sup>3</sup>

"Once frustration has automatically operated, further actings by the parties if evidence of anything can only evidence a new contract."<sup>4</sup>

(c) *A Dissenting Judgment: Contract Severable*

Lord Jamieson dissented. In his view the agreement was not merely a commercial contract but conferred a right to purchase or to take on long lease. That the contract was one contract he conceded, and that the "purchase agreement"

<sup>1</sup> [1943] S.C., at 314. See *per* Lord Wark (at 328). "I think it is sufficient to comply with this principle (*sc.* of Lord Dunedin in *The Metropolitan Water Board Case*) if the length of the interruption is such that it is impossible to forecast the conditions upon which work under the contract may be resumed." The Lord Ordinary's judgment "involves the rewriting of the contract to the effect that, however the contract be ended, the option shall subsist" (at 330).

<sup>2</sup> *Ib.*, at 314, 315, referring to *The Fibrosa Case* [1943] A.C. 32, 70.

<sup>3</sup> *Ib.*, at 315.

<sup>4</sup> *Ib.* at 316, referring to *The Constantine Case* [1942] A.C. 154, 188.

was an integral part. But the purchase agreement did not depend upon the continuation of trading; it came into operation only on the cessation of trading: "Phoenix-like it arises from the ashes of the dead trading agreement."<sup>1</sup> On the termination of the "trading agreement," the agreement remained alive to allow the sale to be carried through, the defenders to pay the agreed price, the pursuers to give a clear title.<sup>2</sup>

(d) *Viscount Simon, L.C. : Termination of a Live Agreement*

On appeal to the House of Lords, it was contended for the appellants that the contract, although one and indivisible, had two main and separate objects: the *trading object*, which may have been frustrated, and the *purchase of the timber yard*, which was unaffected. The option, not the trading, was the substantial purpose of the agreement. The respondents were not called upon.<sup>3</sup>

Viscount Simon, L.C., pointed out that the option arose only "in the event of the foregoing trading agreement being terminated by either party as aforesaid," i.e., by notice:

"If, therefore, the agreement had already been terminated by intervening events such as the war regulations . . ., and its further performance had been frustrated by supervening illegality, the basis on which the option might have been exercised by the appellants had ceased to exist."<sup>4</sup>

Only an "alive and operative" agreement could be terminated by notice, not an agreement already ended by supervening events. The option to buy could not survive the trading agreement; the agreement was one. Both preamble and language proved that "the trading in timber was the main object of the contract."<sup>5</sup>

(e) *Lord Macmillan : "You cannot slay the slain"*

Lord Macmillan quotes the statement of the doctrine of frustration as found in recent editions of Bell's Principles of the Law of Scotland:—

"Where by the nature of the contract its performance depends on the existence of a particular thing or state of things, the failure or destruction of that thing or state of things, without default on either side, liberates both parties."<sup>6</sup> The present was a very clear case of liberation from a contract which emergency legislation had made it illegal to implement:

"It is plain that a contract to do what it has become illegal to do cannot be legally enforceable. There cannot be default in not doing what the law forbids to be done."<sup>7</sup> Even though the exercise of the option would involve no illegality, it arose only upon voluntary termination of the agreement by notice:

<sup>1</sup> [1943] S.C., at 333.

<sup>2</sup> *Ib.*, at 334.

<sup>3</sup> [1944] A.C. 265, 268-9.

<sup>4</sup> *Ib.*, at 270; author's italics.

<sup>5</sup> *Ib.*, at 271.

<sup>6</sup> Cited *ib.*, at 272.

<sup>7</sup> *Ib.*, at 272.

"The operation of the agreement having been compulsorily terminated, neither party can thereafter terminate it voluntarily. You cannot slay the slain."<sup>1</sup>

To judge whether a contract has been frustrated, one must look at the contract as a whole.

"The question is whether its purpose as gathered from its terms has been defeated. A contract whose purpose has been defeated may contain subsidiary stipulations which it would still be possible and lawful to fulfil, but to segregate and enforce such a stipulation would be to do something which the parties never intended."<sup>2</sup>

(f) *Lord Wright: No "indefinite suspense"*

Lord Wright gives a penetrating analysis of the basis of frustration—"a substantive and particular rule which the common law has evolved," a rule which admits of "almost indefinite exemplifications."<sup>3</sup> The application of the principle depends upon the circumstances of the case: "no detailed absolute rule can be stated. A certain elasticity is essential."<sup>3</sup> Whether there is frustration or not does not depend upon "what the parties as individuals might or would have decided if they had thought of the possible frustrating cause"; it depends upon "the view taken of the event and of its relation to the express contract by 'informed and experienced minds.'"<sup>4</sup>

Three separate matters were dealt with by the contract: the purchase and sale of timber; the letting of the yard during the trading; the option to buy the yard or take it on long lease when trading had ceased. The Control of Timber Orders rendered the trading illegal and impossible for an indefinite time; the trading adventure, if it stood by itself, was unquestionably frustrated—and with it, the provisions for the letting of the yard "to enable the trading agreement to be carried out." The option came into force only when the trading was terminated by the election of one party.

"The position must be determined as at the date when the parties came to know of the cause of the prevention and the probabilities of its length as they appeared at the date of the order, but subsequent events ascertained at or before the trial may assist in showing what the probabilities really were."<sup>5</sup>

War is presumed to continue so long "and so to disturb the commerce of merchants, so as to defeat and destroy the object

<sup>1</sup> [1944] A.C., at 273.

<sup>2</sup> *Ib.*, at 274. For a full account of this analysis, see *supra*, 412-414.

<sup>3</sup> *Ib.*, at 274.

<sup>4</sup> *Ib.*, at 276, referring to Lord Sumner's analysis in *The Hirji Mulji Case* [1926] A.C. 497, 510; *supra*, 508.

<sup>5</sup> [1944] A.C., at 278. See *The Styria* (1901), 186 U.S. 1, 14, 17.

of a commercial adventure."<sup>1</sup> The real principle, Lord Wright continues,

"in cases of commercial responsibility is that business men must not be left in indefinite suspense. If there is a reasonable probability from the nature of the interruption that it will be of indefinite duration, they ought to be free to turn their assets, their plant and equipment and their business operations into activities which are open to them, and to be free from commitments which are struck with sterility for an uncertain future period."<sup>2</sup>

This was "the true basis of the rule"—not merely that conditions may be different when the interruption has ceased or that the interruption destroyed the identity of the contractual performance.

Here, the condition precedent of exercising the option was termination of the trading agreement by notice; if that were not fulfilled, no right could arise. "A notice to terminate must imply that there is something to terminate"; here, the trading agreement had already been terminated by frustration.<sup>3</sup>

It had been argued that the whole agreement was one and indivisible and that the contract as a whole remained in effect still capable of fulfilment, unless and until notice was given to terminate the trading agreement, which was given in July, 1941. If this view were right, the right of election could be kept alive for an indefinite time: "an unreasonable and inequitable position."<sup>4</sup> The test of frustration is, "what is the substantial contract, and is that frustrated."<sup>5</sup> Here, "it would be unreasonable not to regard the trading agreement as the substantial matter, so that, when that is frustrated, so is the contract as a whole."<sup>5</sup>

Nor could the option clause survive as a separate agreement, as the arbitration clause survived in *Heyman v. Darwin, Ltd.*<sup>6</sup>; the clause is "quite plain and specific . . . in the limited and grudging terms in which it grants the option to purchase." When trading ceased, the yard, "in the absence of a new and special grant," reverted to the owners.<sup>7</sup>

(g) Lord Porter: Consider "Contract as a whole"

Lord Porter cites with approval a passage from Professor Winfield's edition of "Pollock on Contracts":

" . . . the disturbing cause must go to the extent of substantially preventing the performance of the whole contract.

<sup>1</sup> *Ib.*, cited from Lush, J., in *Geipel v. Smith* (1872), L.R. 7 Q.B. 404, 414.

<sup>2</sup> See note 5, *supra*, p. 522.

<sup>3</sup> [1944] A.C., at 279.

<sup>4</sup> *Ib.*, at 280, referring to Scrutton, J.'s statement of the issue, in *The Leiston Case* [1916] 2 K.B. 428, 439, though Lord Wright doubts whether the same decision would be given to-day.

<sup>5</sup> [1944] A.C., at 280.

<sup>6</sup> [1942] A.C., at 356, 367.

<sup>7</sup> [1944] A.C., at 281.

Interference leaving a considerable part capable of performance will not be an excuse."<sup>1</sup>

For the expression "the whole contract," however," he would substitute the "contract as a whole."<sup>2</sup>

The dispute centred not on principles, but on their application. The "basis or underlying object" of the contract was the supply and acceptance of timber. The option formed part of "the timber selling scheme," and neither formed a basis of the contract nor, but for the scheme, would have been thought of. Different judges might well take different views of the different considerations :

"The conclusion must depend on a question of proportion :

How much importance one attaches to the disposition of the land in relation to the timber contract . . ."<sup>3</sup>

Lord Porter agreed that "the contract as a whole was frustrated at some time before the notice to terminate was given."<sup>4</sup>

#### (h) *Restitution for Improvements ?*

The effects of frustration : the question whether English law differed from Scots law, and whether Scots law would give any restitution for alterations and improvements effected upon the yard ; these issues were not before the House.<sup>5</sup>

### 5. CARRIAGE OF FRUIT FOR 1939-40 SEASON

Where no concluded contract had been made for the carriage of the plaintiffs' fruit from Cyprus to London for the 1939-40 season, the Judicial Committee found it unnecessary to decide whether, assuming a contract, its performance (as the Supreme Court of Cyprus had held) had been rendered impossible by war : *Cyprus Palestine Plantations Co., Ltd. v. Olivier & Company (Cyprus), Ltd.*<sup>6</sup>

<sup>1</sup> 11th ed., 255.

<sup>2</sup> [1944] A.C., at 282.

<sup>3</sup> *Ib.*, at 285.

<sup>4</sup> *Ib.*

<sup>5</sup> See *ib.*, at 281, per Lord Wright. See also at 271, per Lord Thankerton, and at 273, per Lord Macmillan. By the courtesy of the appellants' solicitors, the author was able to study the documents placed before the House.

<sup>6</sup> (1945), 78 Ll. L. Rep. 87, 93, per Lord Goddard (delivering the advice of Lords Thankerton, Lord Porter and Lord Goddard).

## CHAPTER XIX

### ONUS OF PROOF: THE CONSTANTINE CASE

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WHERE an event has occurred frustrating the commercial purpose of a contract, it is not for the party pleading frustration to prove that he has not caused or induced this event; it is for the party seeking to avoid the effect of frustration to prove that the event was due to the neglect or default of the other: *The Constantine Case*.<sup>1</sup>

#### 1. BEFORE ATKINSON, J.

By a charterparty made in August, 1936, *The Kingswood* was to be at Port Pirie, South Australia, to load a certain cargo; it was estimated to arrive about the end of December. In October, the ship left the Tyne for Durban, anchored on 26th December in the roads of Port Pirie and tendered what purported to be, but was not accepted as, a notice of readiness: the steamer never became "an arrived ship." On 3rd January, 1937, while she was anchored, an explosion of extreme violence "of an unprecedented character" occurred from the auxiliary boiler; no sequence of events, other than improbable, could be suggested as a cause. Three theories were formulated before the arbitrator,<sup>2</sup> which he stated might be "possibly correct"; on one of these "improbable suggestions" the negligence of the shipowners might have caused, or contributed to, the disaster. The arbitrator was not satisfied that the true cause

<sup>1</sup> *Joseph Constantine Steamship Line, Ltd. v. Imperial Smelting Corporation, Ltd.* [1942] A.C. 154, reversing the decision of the Court of Appeal [1940] 2 K.B. 430, and restoring the order of Atkinson, J. [1940] 1 K.B. 812.

See Note "P. H. W." in (1941), 57 L.Q.R. 300, 301. And see criticisms of Glanville Williams and Professor Chorley in (1941), 5 Mod. L. Rev. 135-141 and 141-142.

<sup>2</sup> Mr. H. U. Willink, K.C.



of the disaster had yet been suggested.<sup>1</sup> Subject to this case he awarded that the charterers were entitled to damages.

On 17th February, the owners had given notice that they could not perform the charterparty, and it was *agreed* between the parties that the *delay* caused by the damage *frustrated the commercial object* of the adventure. She could not be repaired in Australia and was brought back to England, where a Board of Trade inquiry was held. The charterers claimed damages for failure to load. The owners pleaded frustration without fault; in reply, the charterers said that the owners were at fault.

### (a) *The Question Stated*

Atkinson, J., in a "most careful and elaborate"<sup>2</sup> judgment, examined the main authorities—both upon frustration and upon the onus of proof. The question of law was this: Is it for the person who has *failed to perform his bargain* and is setting up frustration, *to prove affirmatively*, that performance became impossible owing to frustration of the commercial adventure, *and that the impossibility was not due to his negligence?* Or is it for the party *claiming damages to prove* that the impossibility was *due to the negligence of the party in default?* If a ship is lost on the outward voyage—cause unknown—"does the shipowner lose because he cannot disprove negligence, or does the charterer lose because he is unable to prove negligence?"<sup>3</sup>

The true basis of the doctrine of frustration, said the learned judge, was, "perhaps, not yet finally settled": whether it is "the term to be implied into the contract," or whether frustration arises "by operation of law as soon as it appears that the basis of the contract has gone."<sup>4</sup> He preferred to follow Branson, J., who thought that, for a judge of first instance, the matter was concluded by a decision of the Court of Appeal,<sup>5</sup> in favour of the theory of the "implied condition."<sup>6</sup> Some term, then, has to be implied into the contract. In what language is the implied term, "to be deemed to be expressed"? Is frustration *a kind of exceptions clause* upon which, if his negligence has caused the excepted event, a man cannot rely; or does the "implied term" impose upon the party setting it up, the *burden of disproving negligence?*<sup>7</sup>

<sup>1</sup> *Imperial Smelting Corporation, Ltd. v. Joseph Constantine Steamship Line, Ltd.* [1940] 1 K.B., at 812, 813.

<sup>2</sup> *Per* Viscount Simon, L.C.: [1942] A.C. 152, 159.

<sup>3</sup> [1940] 1 K.B. 815-840, at 819.

<sup>4</sup> *Ib.*, at 820, quoting various authorities.

<sup>5</sup> *The Comptons Case* [1920] 1 K.B. 868, 886, *per* Bankes, L.J. *Infra*, 550.

<sup>6</sup> *In Court Line, Ltd. v. Dant and Russell Incorporated* (1939), 44 Com. Cas. 345.

<sup>7</sup> [1940] 1 K.B., at 821.

(b) *Analogies*

In endeavouring to answer this question, Atkinson, J., sought guidance from *analogous cases* in other branches of the law. The owner of a British sea-going ship is not liable, in certain circumstances, to make good loss happening "without his actual fault or privity"; upon him lies the onus of *disproving fault*.<sup>1</sup> This is a "statutory exceptions clause"; the person relying upon it must bring himself within its terms. On the other hand, when a loss apparently falls within an "express exceptions clause," the burden of proving that the owner, on the ground of negligence, is not entitled to its benefit, lies upon the person so contending.<sup>2</sup>

"It is difficult to see," said Atkinson, J., "why the implied frustration term should be treated in the same way as a statutory exceptions clause rather than in the same way as an express exceptions clause."<sup>3</sup>

Moreover, in the case of *incapacity through illness*, it has never been suggested that the sick person must prove absence of fault.<sup>4</sup>

Atkinson, J., refers next to cases relating to the *sale of goods*. The person who relies upon *fire* as an excuse for failure to perform his part of the contract is not called upon to prove that the fire was not due to his negligence.<sup>5</sup>

<sup>1</sup> Merchant Shipping Act, 1894, s. 502. See *per* Hamilton, L.J., in *Asiatic Petroleum Co., Ltd. v. Lennard's Carrying Co., Ltd.* [1914] 1 K.B. 419, 436; affirmed *sub nom. Lennard's Carrying Co., Ltd. v. Asiatic Petroleum Co., Ltd.* [1915] A.C. 705. So also, *per* Viscount Haldane, in *Standard Oil Co., of New York v. Clan Line Steamers, Ltd.* [1924] A.C. 100, 113.

<sup>2</sup> *Per* Lord Esher, M.R., in *The Glendarroch* [1894] P. 226, 232. See also, *per* Lopes, L.J. (at 235): "Where a peril of the sea is set up, it is sufficient for the defendant to prove the peril relied on, and he need not go on to show that that was really not caused by him; but if the plaintiff says that it was, then he must set it up in his replication and must prove it."

<sup>3</sup> [1940] 1 K.B., at 822.

<sup>4</sup> See *Robinson v. Davison* (1871), L.R. 6 Ex. 269, 278. (Leasby, B., there observed: "Disability or incapacity, caused by the act of God, excuses the defendant." Did he mean disability, or incapacity without fault? That this may be so, is suggested by the plea in *Boast v. Firth* (1868), L.R. 4 C.P. 1, 2: "that W F was and is prevented by the act of God, to wit, by personal illness . . . from remaining with or serving the plaintiff . . ." So, in *Cuckson v. Stones* (1858), 1 El. & El. 248, Lord Campbell referred to the plaintiff becoming "by the visitation of God . . . from paralysis or any other bodily illness, permanently incompetent to act . . ." In *Boast v. Firth* (1868), L.R. 4 C.P., at 9, Montague Smith, J., said, *arguendo*: "Lord Campbell there treats the illness as the act of God." And Brett, J., said: "I think permanent illness by the act of God is an exception by way of excuse out of the contract."

See also *The Constantine Case* [1942] A.C. 202, *per* Lord Porter. See Williston, ss. 1930, 1959. See also *Restatement*, ss. 457, 458, 459 (Comment d; Illustration 9).

<sup>5</sup> [1940] 1 K.B., at 823; *Rugg v. Minett* (1809), 11 East 209; *Taylor v. Caldwell* (1863), 3 B. & S. 820, 827, 832, 840. There, the plea expressly stated that the gardens and music hall were destroyed and so far damaged "by accidental fire." And Blackburn J., declared: "This destruction, we must take it on the evidence,

(c) *Certain Frustration Cases*

The judgment in *Taylor v. Caldwell*, says Atkinson, J., contains no statement that *disproof of negligence* is deemed to be incorporated in the implied condition,<sup>1</sup> although it is clear that impossibility of performance caused by the destruction of the subject-matter must be without default of the contractor.

"The inference which one would draw from that is that the implication is simply that the destruction of the subject-matter terminates the contract, but that a person cannot rely on it if it is established that his own default really brought about that destruction."<sup>2</sup>

Blackburn, J., does not regard the implied term as having any reference to negligence, but as a term which cannot be set up if the owner has been in default. *Howell v. Coupland*<sup>3</sup> is cited: nowhere was it suggested that it was for the defendant to prove that his potatoes suffered from blight without default of his own. In *Appleby v. Myers*,<sup>4</sup> Blackburn, J., said: "the plaintiffs, having contracted to do an entire work for a specific sum, can recover nothing unless the work be done, or it can be shown that it was the defendant's fault that the work was incomplete." This, said Atkinson, J., was the only sentence he could find in all the cases that he had examined, clearly indicating the onus of proof.<sup>5</sup>

(d) *Rules of Onus, as in Negligence*

To proof of the "implied condition," Atkinson, J., applied the general rules of proof in the law of negligence. A party seeking compensation for damage must prove that the defendant was in the wrong. The test of the onus of proof is "to ask oneself which party will be successful if no evidence is given, or if no more evidence is given than has been given at a particular point of the case."<sup>6</sup> In the present case, the charterers prove that the ship did not arrive; pausing there, they would win. The owners, however, proceed to show "an accident which destroyed the ship as a navigable unit," and they prove an event which was "the immediate, direct and dominant cause of that destruction."<sup>7</sup> If the case stops there, who wins? The onus of "ultimately satisfying the tribunal that the ship was

was without the fault of either party . . ." author's italics. See *Bullen v. Leake*, 592. Atkinson, J., also refers to *Appleby v. Myers* (1866), L.R. 1 C.P. 615, 616. There, no question of proof arose: the case was originally stated by consent without pleadings, and the fire was described as "accidental."

<sup>1</sup> (1863), 3 B. & S. 826, 939; *supra*, 459.

<sup>2</sup> [1940] 1 K.B., at 824.

<sup>3</sup> (1874), L.R. 9 Q.B. 462, 463, 465.

<sup>4</sup> (1867), L.R. 2 C.P. 651, 661, author's italics, *supra*, 460, note 3.

<sup>5</sup> [1940] 1 K.B., at 826.

<sup>6</sup> *Per* Bowen, L.J., in *Abrath v. North Eastern Rly. Co.* (1883), 11 Q.B.D. 440, at 444, 456.

<sup>7</sup> [1940] 1 K.B., at 828, cited by Viscount Simon, L.C. [1942] A.C. 159.

at fault rests on the charterers." Had they satisfied this onus? Three principles must be applied. *First*, if the accident raises a presumption of negligence, the owners must rebut that presumption.<sup>1</sup> *Secondly*, if the accident affords no evidence of negligence, the charterers must prove negligence. *Thirdly*, if the onus is upon the owners, they may discharge that onus by proving facts from which the inference that there was no negligence is as strong as the inference that there was negligence. For the third principle, Atkinson, J., cited Lord Dunedin's opinion in *Ballard v. North British Rly. Co.*,<sup>2</sup> "If the defenders can show a way in which the accident may have occurred without negligence, the cogency of the fact of the accident by itself disappears, and the pursuer is left as he began, namely, that he has to show negligence."

The unusual explosion of a boiler under the owner's management affords some evidence of want of care. But if, after the evidence has been considered,

"the scales are even, if the tribunal is unable to say that the facts are more consistent with negligence than with the absence of negligence, the plaintiff fails."<sup>3</sup>

Was the present, a case of "self-induced frustration"? That does not include "the mere possibility of relevant default."<sup>4</sup>

"After all, the basis of an implied term is that it is supposed to be of such a character that, if it had been mentioned at the time of the making of the contract, both parties would have said: 'Yes. We both meant that. Put it in.' Can I possibly say that the shipowners would readily and as a matter of course have assented to the incorporation of a term which deprived them of the right of relying on the doctrine of frustration unless they could prove in any circumstances that by no possibility could any negligence of theirs have accounted for the accident, on any theory, however improbable?"<sup>5</sup>

The burden of proving their case was upon the charterers. This burden they had failed to discharge and the claim for damages failed.

## 2. IN THE COURT OF APPEAL

It was argued by the charterers, on appeal, that where a contract cannot be performed, the contractor must prove that

<sup>1</sup> *Scott v. London Dock Co.* (1865), 3 H. & C. 596, 601, per Erle, C.J.; *The Merchant Prince* [1892] P. 179; *Czech v. General Steam Navigation Co.* (1867), L.R. 3 C.P. 14, 19, per Willea, J.

<sup>2</sup> [1923] S.C. 43, 53, 54. The statement of the law in this dissenting opinion has been subsequently approved.

<sup>3</sup> *Ib.*, at 833; citing *Wakelin v. London & South Western Rly. Co.* (1886), 12 App. Cas. 41, 44, per Lord Halsbury, L.C.; *The Kite* [1933] P. 154, 168, per Langton, J., *Brook's Wharf & Bull Wharf, Ltd. v. Goodman Brothers* [1937] 1 K.B. 534, 539; *The Stranna* [1937] P. 130, 140, per Langton, J.; affirmed: [1938] P. 69.

<sup>4</sup> [1940] 1 K.B., at 838.

<sup>5</sup> *Ib.*, at 839.

failure to perform was not through any fault of his. The owners contended that the essence of frustration was that failure to carry out the contract was not the fault of the party setting up the plea. It was for the owners to set up frustration and then for the charterers to prove negligence.<sup>1</sup>

This was "a very simple case," said Scott, L.J., in a very short extempore judgment, with which Sir Wilfrid Greene, M.R., and Goddard, L.J., agreed. No authorities were cited. Two sentences contain the operative part of the decision.

"A party *prima facie* guilty of a failure to perform his contract cannot escape under a plea of frustration, unless he proves that the frustration occurred without his default. There is no frustration in the legal sense unless he proves affirmatively that the cause was not brought into operation by his default."<sup>2</sup>

Leave to appeal was refused by the Court of Appeal, but was granted by the Appeal Committee of the House of Lords which restored the order of Atkinson, J.<sup>3</sup>

From the speeches in the House of Lords it is manifest that the question was one of great difficulty. Lord Wright, in particular, examines very closely several approaches to a solution, and only after carefully testing the problem from several points of view arrives at the conclusion that the ordinary rules of onus of proof should apply.<sup>4</sup> Lord Porter, too, pointed out that "without default of either party" was ambiguous, and that, on the words themselves, either interpretation was possible.<sup>5</sup> Although Scott, L.J., had disposed of the question in a short rule unfortified by authority, it should not be forgotten that he had argued the doctrine in *The Badische Case*<sup>6</sup> and that his experience of frustration arising out of the last war is profound—rivalled only by the experience of MacKinnon, L.J., and Lord Wright. For the rule enunciated by the Court of Appeal there was clearly a case, and a strong case; in the *First Edition*, the author independently took the same view. After considering the speeches in the House of Lords—a new thesaurus of dicta upon frustration, and onus of proof—the author withdraws his view and agrees with respect that, regarding the question as one of "common sense as related to justice," it is not for the party pleading frustration to prove that he was free from fault.<sup>7</sup>

<sup>1</sup> [1940] 2 K.B. 430, 431–432.

<sup>2</sup> *Ib.*, at 433; cf. Halsbury, *Laws of England*, 2nd ed., vol. VII, p. 208, para. 292.

<sup>3</sup> [1942] A.C. 154.

<sup>4</sup> [1942] A.C., at 191 *et seq.*

<sup>5</sup> *Ib.*, at 179, 200.

<sup>6</sup> [1921] 2 Ch. 331, 342–346.

<sup>7</sup> See the learned monograph of Professor Julius Stone, D.C.L., *Burden of Proof and the Judicial Process: A Commentary on Joseph Constantine Steamship, Ltd. v. Imperial Smelting Corporation, Ltd.* (1944), 60 L.Q.R. 262–284. He points out that the rule laid down by the House of Lords is really a new rule, and one of

### 3. IN HOUSE OF LORDS

#### (a) *The "Implied Term" Writ Large*

The question, said Viscount Simon, L.C., was not "a very simple one"; the point had not as yet been directly decided.<sup>1</sup> When a frustrating event is proved and when, at the end of the case, no inference of "default" exists and the evidence is equally consistent with either view, does the defence fail because the defendant has not proved that the event was not due to his default?<sup>2</sup>

The Lord Chancellor puts the case that Atkinson, J., had put: A vessel disappears during a storm. Does the defence of frustration depend upon the owner's ability to prove that the ship was navigated "with adequate skill" and that there was "no default which brought about the catastrophe"?<sup>3</sup> Or this: A vessel in convoy is torpedoed and sinks. Must the owners prove that those on board were "keeping a good look-out, were obscuring lights, were steering as directed, and so forth"? No reported case lays down such doctrine.<sup>4</sup> The impossibility must arise "without default of the contractor," but this does not mean that the defendant must disprove fault. It means "no more than that, unless default is proved or ought to be inferred, the defence is complete. Where the onus lies is still to be determined."<sup>4</sup>

"Frustration" does not merely provide a defence:

"It kills the contract itself and discharges both parties automatically."<sup>5</sup>

Whichever way the doctrine is put, the legal consequence is the same. "The most satisfactory basis," said Viscount Simon, "is that the doctrine depends on an implied term in the contract of the parties." Thus, there can be no discharge by supervening impossibility if, notwithstanding the supervening event, the express terms bind to performance. Frustration depends on the terms and surrounding circumstances of each contract.<sup>5</sup>

-----  
policy not of logic, and he pleads that the court should openly recognise this instead of relying upon inconclusive authority and ambiguous *obiter dicta*.

"In such cases of first impression, the choice of the court is not between making a new rule or adhering to the old rule. It is between making one new rule or making a different new rule . . . the closer the court's scrutiny of its own articulated premise, the sounder will be the process of common law development" (at 284).

This "self-scrutiny" should be reflected in the judgments, not "concealed by citation of ambiguous dicta and doubtful analogy." Yet this is the way of precedent.

"I have grown to see that the [judicial] process in its highest reaches is not discovery, but creation," said Benjamin Cardozo, in *The Nature of the Judicial Process* (1921), 166.

<sup>1</sup> *Ib.*, at 160. See also *per* Viscount Maugham, at 169.

<sup>2</sup> *Ib.*, at 161.

<sup>3</sup> *Ib.*, at 162.

<sup>4</sup> *Ib.*, at 162, 163.

<sup>5</sup> *Ib.*, at 163.

"Every case in this branch of the law can be stated as turning on the question whether, from the express terms of the particular contract, a further term should be implied which, when its conditions are fulfilled, puts an end to the contract."<sup>1</sup>

The implied term may well be:—

"This contract is to cease to be binding if the vessel is disabled by an overpowering disaster, provided that disaster is not brought about by the default of either party."<sup>1</sup>

The case resembles an express exception of "perils of the seas." The shipowner proves a *prima facie* case of loss by sea perils, and then he is within the exception. It is for the cargo owner, by rejoinder, to prove negligence or unseaworthiness.<sup>1</sup>

If there is a bailment of goods to be kept in a named warehouse, loss by fire excepted, proof of destruction by fire *prima facie* excuses the bailee. It is for the bailor to prove that the bailee was negligent, though he might rely on facts proved or admitted by the bailee.<sup>2</sup> In *Jackson's Case*,<sup>3</sup> no one suggested that the jury ought to be asked: "Have the ship-owners proved that the stranding took place without negligence or default on the part of themselves or their servants?"<sup>4</sup>

"The ambit of 'default'"—concluded the Lord Chancellor by way of obiter dictum—"as an element disabling the plea of frustration to prevail" has not yet been "precisely and finally determined." "Self-induced frustration . . . involves deliberate choice." "Default" is a wider term. In many commercial cases of frustration, the term has been treated as equivalent to negligence. But in a contract for personal services it has not been laid down that personal incapacity, if due to want of care, does not frustrate.

"The implied term in such a case may turn out to be that the fact of supervening physical incapacity dissolves the contract without inquiring further into its cause, provided, of course, that it has not been deliberately induced in order to get out of the engagement."<sup>5</sup>

(b) "Common sense as related to Justice"

Viscount Maugham formulates<sup>6</sup> four propositions:—

(i) Whether the doctrine of frustration rests on an implied term, or is otherwise to be explained, it is based upon "the presumed common intention of the parties."

<sup>1</sup> *Ib.*, at 164, citing *The Glendarroch* [1894] P. 226; Scrutton, art. 91, para. 3; Carver, s. 78; *The Northumbria* [1906] P. 292, 298. See *Texas Co. v. Hogarth Shipping Co.* (1920), 256 U.S. 619, 629, 630, *per* Van Devanter, J.

<sup>2</sup> [1942] A.C., at 165.      <sup>3</sup> (1874), L.R. 10 C.P. 125.      <sup>4</sup> [1942] A.C., at 165.

<sup>5</sup> *Ib.*, at 167. See also *per* Viscount Maugham, at 173.

<sup>6</sup> *Ib.*, at 169, referring to Halsbury, *Laws of England*, 2nd ed., vol. VII, p. 215.

(ii) A frustrating event brings the contract to an end "forthwith and automatically."<sup>1</sup>

(iii) The legal effect of frustration does not depend upon the intention or opinions of the parties, or even their knowledge as to the event.<sup>2</sup>

(iv) Legal rights accrued are unaffected.<sup>3</sup>

"Frustration operates automatically, for the good or ill of both parties." This, irrespective of the wishes of either party, "their temperaments and failings, their interest and circumstances."<sup>4</sup> It must, of course, arise "without blame or fault on either side."<sup>5</sup> If a party pleading frustration were required to prove that he was not in default, that would mean that "the determination of the contract by frustration is not the axiomatic result of the event, but is dependent on the option of the parties, for neither party can be compelled to call evidence to prove affirmatively that the cause was not due to his default."<sup>6</sup>

It would be "unreasonable, if not absurd," to place upon the party pleading frustration the onus of proof that he was not responsible for the frustrating event. Destruction of a building by fire is generally due to someone's fault: it may be quite impossible for the owner of a large building to prove that an employee who has left his service was not guilty of default.<sup>7</sup>

At the date of the contract, it is usually impossible to know which party will desire to rely upon frustration if it occur.

"In these circumstances, I cannot see why a court should decide that the parties ought to be presumed to have intended that the ordinary rules as to onus of proof ought not to apply. After all, the question is essentially one of common sense as related to justice."<sup>8</sup>

"*Ei qui affirmat, non ei qui negat, incumbit probatio.*"

"It is an ancient rule founded on considerations of good sense, and it should not be departed from without strong reasons."<sup>8</sup>

The "mere possibility of default" on the part of the ship-owners did not disentitle them to rely upon frustration.<sup>9</sup>

(c) "*Ultimate result of the whole Evidence*"

Lord Russell of Killowen summarised thus "the rival contentions":

"(1) The appellants say: 'Frustration will excuse unless it is proved to be self-induced.' (2) The respondents say:

<sup>1</sup> Per Lord Sumner, in *The Hirji Mulji Case* [1926] A.C. 497, 505.

<sup>2</sup> *Ib.*, at 509.

<sup>3</sup> [1942] A.C., at 169, 170.

<sup>4</sup> [1926] A.C., at 510.

<sup>5</sup> Per Lord Sumner, in *The Bank Line Case* [1919] A.C. 435, 452; *supra*, 496.

<sup>6</sup> [1942] A.C., at 172.

<sup>7</sup> *Ib.*, at 173.

<sup>8</sup> *Ib.*, at 174.

<sup>9</sup> *Ib.*, at 176.



'Frustration will not excuse unless it is proved not to be self-induced.'"<sup>1</sup>

For *three* reasons, the appellants were right. *First*, "the proving of a negative . . . would be a most exceptional burden to impose on a litigant." *Secondly*, in no reported case of frustration has this attempt been made or called for. *Thirdly*, the statement of the doctrine in the authorities does not compel the adoption of the other contention.<sup>1</sup>

The language of Blackburn, J., in *Taylor v. Caldwell*<sup>2</sup> does not "justify, much less compel, the view that proof of absence of default is a condition precedent to the application of the doctrine": the words "without default of the contractor" are merely "a proviso or exception to the doctrine, namely, that, if the destruction of the *corpus*<sup>3</sup> has been brought about by the fault or default of one of the contracting parties, that party would not be excused."<sup>4</sup>

Whether the doctrine of frustration applies in favour of a party sued depends "upon the ultimate result of the whole evidence." The defendant will prove the destruction of the *corpus*, and, where possible, the frustrating event. If that event raises a *prima facie* case against him of fault or default, then, unless he displace that case, the frustration will stand, "as self-induced." If nothing however is known of such an event, or if the known event raises no *prima facie* case against him, and if the matter rests there, the defendant will be excused. But the plaintiff—by evidence, or by cross-examination, or both—may prove fault or default against the defendant, who then must fail.

"In every case, the contractor will succeed or fail in his defence of frustration according as it is not or is found as the result of the whole evidence that the frustration was self-induced."<sup>5</sup>

In the present case, no *prima facie* fault or default was raised against the shipowners. No finding of fault or default was made against them. It was impossible to say that the frustration was self-induced. The shipowners were relieved from liability.<sup>6</sup>

No question arose as to "the kind or degree of fault or default" that would debar a contractor from relying on frustration. Varieties—ranging from criminality to thoughtlessness—were infinite.

"I wish to guard against the supposition that every destruction of *corpus* for which a contractor can be said, to some extent or in some sense, to be responsible, necessarily involves that the resultant frustration is self-induced within the meaning of the phrase."<sup>6</sup>

<sup>1</sup> [1942] A.C., at 177.

<sup>2</sup> (1863), 3 B. & S. 826, 833, 839.

<sup>3</sup> On Lord Russell's use of this phrase, see [1942] A.C., at 176.

<sup>4</sup> *Ib.*, at 176, 177.

<sup>5</sup> *Ib.*, at 178.

<sup>6</sup> *Ib.*, at 179.

(d) "*Presumption of Innocence*"

The question, said Lord Wright, was whether, in the case of admitted frustration, no default of either party being proved, the promisors are liable in damages.<sup>1</sup> Scott, L.J.'s statement of the principle was "manifestly different" from the statement by Blackburn, J.<sup>2</sup> "Without fault of either party" means that "a party who *by his fault* has caused the impossibility cannot take advantage of his own wrong": he has "prevented performance in the substantial sense."<sup>3</sup> But Blackburn, J., did not say that a party relying on impossibility must prove that the impossibility was not due to his default.

Lord Wright proceeds to expound the meaning of "frustration" and to show "how wide and various is the range of circumstances to which it may extend and how manifold are the complications involved in the rule laid down by the Court of Appeal that there is an affirmative onus of disproving fault on the party claiming to rely on frustration."<sup>4</sup>

The suggested rule was "anomalous and unreasonable."

"The doctrine of frustration is intended to achieve a just and reasonable result."<sup>4</sup>

The classical passages from Lord Watson<sup>5</sup> and Lord Sumner<sup>6</sup> are cited to emphasise that, by the doctrine of frustration, the court is exercising its powers "in order to achieve a result which is just and reasonable. It would, indeed, be strange if it clogged its decision with the qualification which the Court of Appeal would impose, but which seems to me . . . inconvenient and unreasonable."<sup>7</sup>

Another aspect of the doctrine was difficult to reconcile with the decision of the Court of Appeal. "Frustration operates automatically. It does not depend on the choice or election of the parties to the contract."<sup>8</sup> . . . the contract is ended and dead simply by the frustrating event. If the parties choose to go on with it, that is, in truth, entering into a new contract . . .

The position of the parties ought to be determined at once, and an indefinite suspense avoided. But this result is just what the decision of the Court of Appeal would prevent, because, according to the decision, it cannot be known whether there has been frustration in a legal sense unless and until it is proved affirmatively by one party or the other that the frustration was not brought into operation by his default."<sup>9</sup>

<sup>1</sup> [1942] A.C., at 181.

<sup>2</sup> In *Taylor v. Caldwell* (1863), 3 B. & S. 526, 539: *supra*, 459.

<sup>3</sup> [1942] A.C., at 182, citing the illustration given by Willes, J., in *Inchbald's Case* (1864), 17 C.B. (N.S.) 733, 741.

<sup>4</sup> [1942] A.C., at 183. See Note (1941), 19 Can. Bar Rev., 612-614.

<sup>5</sup> In *Dahl v. Nelson, Donkin & Co.* (1881), 6 A.C. 38, 59, *supra*, 477.

<sup>6</sup> In *The Hirji Mulji Case* [1926] A.C. 497, 507, 510; *supra*, 507-509.

<sup>7</sup> [1942] A.C., at 186.

<sup>8</sup> *Ib.*, at 187.

<sup>9</sup> *Ib.*, at 188.

No authority—either in English or in American cases—could be found for the rule enunciated by the Court of Appeal. In most of the English cases, “questions of responsibility do not arise.”<sup>1</sup> Lord Sumner had declared that frustration must arise

“without blame or fault on either side. Reliance cannot be placed on a self-induced frustration.”<sup>2</sup>

If Caldwell had burnt down the music hall, Lord Sterndale, M.R., had said, he could not have pleaded that the subject-matter was gone and the contract frustrated.<sup>3</sup> No one until now, Lord Wright continued, had suggested that Caldwell could not have relied on the destruction of the music-hall “unless he had affirmatively proved that he was not responsible for it and was not in fault.”<sup>4</sup>

“The essence of ‘frustration’ is that it should not be due to the act or election of the party.”<sup>5</sup>

But for such and similar opinions, the “more logical view” might be that in frustration, *two* elements must be considered: “(1) impossibility or frustration under the contract and the facts, and (2) the causation of that impossibility or frustration, whether or not it is imputable to the fault of either party . . . if frustration means not only that performance has become impossible, but that neither party is responsible, there can be no frustration in that sense unless both conditions are fulfilled.”<sup>6</sup> Upon this definition—which English law seems to have accepted—the Court of Appeal must have proceeded. But a party, instead of electing to rescind for breach by the other party, might wish to rely on frustration and, at the same time, claim damages for the breach of contract. Such a case, said Lord Wright—if the authorities have not excluded it—might be open. Hence the reference to the fault of “either” party, instead of to the fault of the party relying on the doctrine, though “‘either party’ may simply mean ‘one party or the other, if either is responsible.’” This view would be fatal to the conclusion of the Court of Appeal because *two separate issues* must then be proved by the parties who severally raised them.<sup>6</sup>

The present appeal, however, could be decided by applying the ordinary rules as to onus of proof.

“If frustration is viewed (as I think it can be) as analogous to an exception, since it is generally relied upon as a defence to a claim for failure to perform a contract, the same rule will properly be applied to it as to the ordinary type of

<sup>1</sup> [1942] A.C., at 189.

<sup>2</sup> In *The Bank Line Case* [1919] A.C. 435, 452; *supra*, 496.

<sup>3</sup> In *Mertens v. Home Freeholds Co.* [1921] 2 K.B. 526, 536, 537; *infra*, 552.

<sup>4</sup> [1942] A.C., at 190.

<sup>5</sup> *The Maritime National Fish Case* [1935] A.C. 524, 530, *per* Lord Wright, *infra*.

<sup>6</sup> [1942] A.C., at 191. See *per* Lord Porter, at 199, 200.

exceptions. The defence may be rebutted by proof of fault, but the onus of proving fault will rest on the plaintiff."<sup>1</sup>

Secondly, the ordinary rule is that

"a man is not held guilty of fault unless fault is established and found by the court."<sup>1</sup>

This "presumption of innocence" is no less true in civil disputes than in criminal cases. *Fraud* must be alleged and proved. If, at the end of a case, *unseaworthiness* is not established as the cause of the loss, the defence fails. *Negligence*, as overriding the excepted perils, must be alleged and proved:—

"If the matter is left in doubt when all the evidence has been heard, the party who takes upon himself to affirm fault must fail."<sup>2</sup>

The rule of the Court of Appeal would often "work serious injustice and nullify the beneficial operation of the doctrine of frustration which has been somewhat empirically evolved with the object of doing what is reasonable and fair . . ."<sup>2</sup>

The *inconvenience* of the rule is obvious. In many cases of frustration—e.g., earthquakes and unusual floods—there is "little or no room for human activity." In other cases—e.g., requisition or refusal of a licence—there "is little room for intervention by the parties." Must the party claiming prove that he has not caused or induced the frustration? If, in a cyclone, a ship is lost with all hands, must the shipowners prove that the master did not receive, or ignored, warnings of danger?<sup>3</sup> If a ship is torpedoed with all hands, must the shipowner prove absence of fault, e.g., that the ship obeyed the convoy regulations? To exclude the *possibility of fault* may be impossible; and, even after long inquiry, a casualty may be unexplained.<sup>4</sup>

The Court of Appeal would place upon the shipowner the burden of proving a negative. Anomalous cases, indeed, there are. Thus, the liability of a bailee depends on the special obligation anciently imposed on him by law.<sup>5</sup> The liability of a common carrier depends on the custom of the Realm. The Merchant Shipping Act, 1894, permits a shipowner to limit the damages, provided that he prove that the casualty happened without his actual fault or privity.<sup>6</sup> All these cases depend on special contracts or statutes.

By "self-induced" frustration," said Lord Wright, Lord Sumner clearly had in mind—

"positive acts against the faith of the contract which amount to a repudiation and would justify rescission."<sup>7</sup>

<sup>1</sup> [1942] A.C., at 192.    <sup>2</sup> *Ib.*, at 193.    <sup>3</sup> *Ib.*, at 193.    <sup>4</sup> *Ib.*, at 194.

<sup>5</sup> See *Brook's Wharf & Bull Wharf, Ltd. v. Goodman Brothers* [1937] 1 K.B. 534, 538, *per* Lord Wright, M.R.

<sup>6</sup> Sections 502, 503; *supra*, 527, note 1.

<sup>7</sup> [1942] A.C., at 195. See *Poussard v. Spiers* (1876), 1 Q.B.D. 410, 414, *per* Blackburn, J.

"Mere negligence" has never been regarded, for this purpose, as constituting "fault." No one suggested that Caldwell must explain whether any servant of his had negligently caused the fire, nor did anyone ask whether the *prima donna* who claimed to be excused, had been careful of her health.<sup>1</sup> "Gross delinquency" might amount to repudiation.<sup>1</sup> The absence of the definition of "default" makes the rule of the Court of Appeal even more objectionable.

"In my opinion," Lord Wright concluded, "this is a case in which it is found that there has been an unexplained casualty frustrating the contract. The real cause cannot be ascertained. No fault is shown against the appellants. I think that they are entitled to rely on the frustration as a defence to the claim."<sup>2</sup>

(e) "*Without Default*": no bearing on *Onus of Proof*

Lord Porter says that if the words "without fault on either side" be strictly interpreted, the contract would not be at an end unless *neither* party were in fault.<sup>3</sup> A party pleading frustration would be "in considerable difficulty": to make his defence good he would have to prove that not only he, but his opponent also, was not in fault.<sup>4</sup>

The expression should not be "so strictly interpreted." Blackburn, J., had originally spoken of the fault of the *contractor*, and so had other judges; they were stressing not "the freedom from blame of both parties," but the fact that a party in default cannot rely on frustration due to his own wrong: the "change in expression"—i.e., from the default of the *contractor*, to the fault of *either party*—is "comprehensible enough."

"It signifies only that the party in default cannot take advantage of his own wrong. It is a personal disqualification preventing him from taking advantage of a frustration which has automatically occurred, not a condition of its occurrence."<sup>4</sup>

The phrase "without default of either party" is ambiguous. It might mean *either* that the party pleading frustration must prove the destruction of the subject-matter and that he is not to blame, *or* that he succeeds if he proves the destruction unless it be shown that he is in fault.<sup>1</sup> Either interpretation is possible: the words are inconclusive. Some other reason must be found.

"The true principle seems to be," said Lord Porter, "not that all contracts must *prima facie* be performed whether performance be possible or not, but that there are some contracts absolute in their nature where the promisor warrants the possibility of performance. These he is bound to perform in any event or to pay damages, but there are other cases where the promisor is only obliged to perform if he can. In a contract

<sup>1</sup> See note 7, *supra*, p. 537.

<sup>2</sup> [1942] A.C., at 196.

<sup>3</sup> *Ib.*, at 199.

<sup>4</sup> *Ib.*, at 200.

for personal performance where he dies, or in certain other cases where the subject-matter of the contract is destroyed, he cannot implement his promise. In such cases he is excused unless he be in fault. Of course, if he is in fault because his deliberate act has done away with the subject-matter of the contract, and, perhaps, if he has been negligent, he cannot recover. But *prima facie* he escapes. To make him liable, his fault must be proved by the party which alleges that it destroys his excuse.<sup>1</sup> This principle, it is submitted with great respect, is a dangerous one, and unsupported by authority. When is a contract "absolute," and when—and on what principle—are you "only obliged to perform if you can"?

Where the promisor makes an *absolute* promise, he takes the risk; he must perform or pay damages: no question of frustration can arise. Where impossibility of performance is an excuse, the promise is not absolute, but "conditional on something, i.e., the possibility of performance."<sup>2</sup> Why, then, impose the obligation of proving innocence of fault?

"In truth, the words 'without default on either side' are not used for the purpose of establishing what has to be proved by either party. Rather they are necessarily inserted to limit the cases to which the doctrine of frustration applies. If a party be in fault the doctrine is not to be invoked by him. If he is not in fault, it may be. But they have no bearing on the onus of proof. They qualify the doctrine; they do not impose on the party seeking to be excused the necessity of proving want of fault in himself or in his opponent."<sup>3</sup>

Whether "default" includes negligence—e.g., where the contractor negligently destroys the subject-matter of the contract—Lord Porter preferred to leave open.<sup>3</sup>

<sup>1</sup> [1942] A.C. 203, 204.

<sup>2</sup> *Ib.*, at 205.

<sup>3</sup> *Ib.*, and citing Salmond and Winfield, *Contracts*, 314.

# CHAPTER XX

## NO FRUSTRATION OF CONTRACT

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## A. ARISING OUT OF WAR OF 1914, AND AFTER

## 1. PERSONAL RESIDENCE, NOT BASIS OF TENANCY

It is not the basis of a contract of tenancy that the tenant should continue to be allowed by law to inhabit *in person* the demised premises. Where, upon the outbreak of war, the tenant who became an alien enemy was prohibited from residing within the area of the demised premises, he remained liable for the rent: *Schlesinger's Case*.<sup>1</sup>

In March, 1914, the defendant, an Austrian, became the tenant for three years of a flat at Westcliffe. Without the landlord's written consent, he was not to assign or sublet the premises; such consent not to be unreasonably withheld. By the Aliens Restriction (Consolidation) Order, made in September, 1914, no alien enemy, save by permit, might reside temporarily or permanently at Westcliffe. The landlords sued for rent for the quarter expiring in March, 1915. The tenant said that from the date of the order the tenancy was determined. The Common Serjeant gave judgment for the landlords.

The Divisional Court dismissed the appeal. The lease was not avoided by the order, nor did the order make it illegal for an enemy to hold land in a prohibited area.

Lush, J., added that although personal residence was *the purpose*, it was *not* the "foundation of the contract." *Part of the consideration* for the rent was the right, subject to conditions, to assign or sublet. Since the contract could be performed without the personal residence of the tenant, prohibition of his personal residence did not make performance impossible. Moreover, the contract vested in him a term of years, and that interest remained unaffected.<sup>2</sup>

## 2. PARTIAL FRUSTRATION; CONTRACT REMAINS

Where, by administrative order, it becomes *unlawful to perform some* of the contractual obligations, while other obligations may lawfully be performed, the contract is not frustrated: *The Leiston Case*.<sup>3</sup>

<sup>1</sup> *London & Northern Estates Co. v. Schlesinger* [1916] 1 K.B. 20.

<sup>2</sup> [1916] 1 K.B., at 24. Cited and followed by Earl of Reading, C.J., in *Whitehall Court, Ltd. v. Ellinger* [1920] 1 K.B. 680, 686; *per* Bankes, L.J., in *Matthey v. Curling* [1922] 2 A.C. 180, 185.

The dictum is discussed in *The Cricklewood Case* (1945), 61 T.L.R. 202. Lord Russell of Killowen and Lord Goddard rely upon it in support of their view that a lease cannot be determined by frustration. Viscount Simon, L.C., and Lord Wright point out that the dictum was not necessary for the decision.

On *The Whitehall Case*, see Lord Wright's critique (1945), 61 T.L.R., at 207.

<sup>3</sup> *Leiston Gas Co. v. Leiston-cum-Sizewell Urban Council* [1916] 1 K.B. 1912; [1916] 2 K.B. 428; followed in *Burton & Son v. W. H. Bowater, Ltd.* (1921), Ll. L. Rep. 336 (Court of Appeal). See *Neon Case* [1942] 1 D.L.R., 26.

This decision has been doubted in *The Denny Mott Case* [1944] A.C. 265, 271,



A gas company contracted with an urban council to light their district for five years from August, 1911, the contract to remain in force until determined by six months' notice on either side. The company were to provide standards, lamps and plant; to connect these with their mains; to supply gas; and to light, extinguish, clean, repair, paint and maintain the lamps. The council agreed to pay, *in equal quarterly instalments*, £1 7s. 6d. per lamp per annum for lamps extinguished, and a greater sum for lamps burning all night. By an order made in January, 1915, under the Defence of the Realm Regulations, 1914, public lighting was forbidden. For three and a half years the company had performed the various services under the contract. In November, 1915, the company sued the council for the three quarterly instalments due after the date of the order.

Low, J., held that the contract was not only a contract to furnish light, but a *contract to furnish plant*, and that it was *impossible to distinguish how much was deferred payment for plant and how much was payment for gas consumed*. The company must be ready, upon relaxation of the regulations, to go on providing the light, and must keep the apparatus in working order.<sup>1</sup>

The decision was affirmed. Lord Reading, C.J., said:—

"it is often difficult . . . to determine on which side of the line the particular case falls. The decision in this case must depend on the true effect of the contract."<sup>2</sup>

Part of the performance of the contract had become *unlawful*, but another *part* was *lawful* and could be performed.<sup>3</sup> The contract was not at an end.

"There is an inclusive payment for all the services, and the consideration cannot be apportioned."<sup>4</sup>

Scrutton, J., thought that the period of nine months up to the date of the writ, during which lighting was prohibited, was not sufficient to annul a contract which was to last five years and perhaps more, and of which the council, for three and a half

*per* Viscount Simon, L.C., *per* Lord Wright at 280, and *per* Lord Porter, at 282.

Contrast *The Egham Case* (1941), 1 All E.R. 107, *supra*, 516-518.

See also the observations in Court of Session. [1943] S.C. 315, *per* Lord Justice Clerk (Cooper): the decisions belong to "the opening phase of the more recent development of a doctrine which is still in process of development." "An instance of assumed severability," observed Lord Mackay (*ib.*, at 325) "A very narrow and special case": *per* Lord Wark (*ib.*, at 329). Compare *Wood v Bartolino* (1944), 48 N.M. 175, 146 P. (2d) 883, cited and discussed (1944), 20 New York Univ. L.Q.R. 239-241. A covenant restricted the use of the premises "for use solely as a filling station, and not for a restaurant or lunch counter purposes." It was pleaded that rationing regulations had frustrated the primary purpose of the lease. The regulations, it was held, restricted partially, but did not wholly prohibit lawful user in accordance with the lease. (See Williston, vol. VI, s. 1955.)

<sup>1</sup> [1916] 1 K.B., at 915, 916.

<sup>2</sup> *Id.*, at 433.

<sup>3</sup> [1916] 2 K.B., at 432.

<sup>4</sup> *Id.*, at 434.

years, had enjoyed the benefit. Although a mere failure to supply would not, of itself, relieve from payment,

"a failure of such a lengthy and permanent character as substantially to alter the mode of performance of the contract will have this effect and terminate the contract."<sup>1</sup>

### 3. TEMPORARY SUSPENSION DOES NOT DISSOLVE

Where, by reason of an act of the Executive Government, such as the imposition of an embargo or the prohibition of export, a *temporary suspension* occurs which does not prevent the agreement from being carried out within a reasonable time, the contract is not dissolved: *The Andrew Millar Case*.<sup>2</sup>

By contracts made in June and July, 1914, manufacturers of confectionery at Belfast agreed to deliver large amounts of

<sup>1</sup> [1916] 2 K B, at 439, 440. Lord Wright, citing this passage in *The Denny Mott Case* [1944] A.C. 265, 280, observes:—

"I am not clear that the same decision would be given to-day. But questions of applying the doctrine may always be difficult to solve. So far as principle goes, the decision is important, in so far as it directs attention to the test, which is, what is the substantial contract and is that frustrated."

<sup>2</sup> *Andrew Millar & Co, Ltd v. Taylor & Co, Ltd* [1916] 1 K B. 402, explained by Warrington, L.J., in *Metropolitan Water Board v. Dick, Kerr & Co.* [1917] 2 K.B. 1, 24. See statement of Buckmaster Committee (1918), Cd. 8975, cited in (1939), Cmd 6100, at p. 5. "If the obligations undertaken become illegal either by reason of the other party to the contract becoming an enemy or by reason of a duly constituted authority lawfully prohibiting its performance, the contract is dissolved, *unless the illegality is of so temporary a character that the time for the performance of the obligations may not have elapsed before the illegality ceases.*" (Author's italics) *Supra*, 420.

Thus, in *Austen, Baldern & Co. v. Wilfrid Turner & Co., Ltd* (1920), 36 T.L.R. 769, the defendants ordered from an American firm 6,000 lb. of saccharin, to be delivered at the rate of 500 lb. per month from January, 1919, at \$11 per lb., f.o.b., New York. By a proclamation of the President of the U.S.A., the export of saccharin was prohibited except under permit, but would be permitted if a request were made by the British Government and if their licence were communicated to the United States Government. The defendants were refused a permit by the Board of Trade and cancelled the contract. Avory, J., held that "the defendants expressly and as part of the contract took the risk of obtaining a permit, and it does not lie in their mouths to say that the contract was frustrated because they could not do so. I think it was the defendants' duty to wait a reasonable time to see if permission could have been granted later" (at 771). By 20th December, 1918, all restrictions had been removed. The contract was made in August, 1918.

Again, in *Cantiere Navale Tristina v. Handelsvertretung der Russe Soz. Fod. Naphtha Export* (1925), 94 L.J.K B. 679, an Italian tank steamer was chartered by a Russian company to proceed to Batum, in the Black sea, and there load a cargo of oil. Lay days were to commence from the date of the notice of readiness to load, the usual exceptions clause was inserted. The steamer reached Batum, but the local military authorities ordered her to leave on the ground that no trading with Italian vessels was allowed. The steamer left; proceeded to Constantinople, where she stayed eleven days and then returned to Batum. After some delay, partly due to permission to load being still withheld, and partly due to weather, she loaded. The shipowners claimed demurrage after notice was given of readiness to load. It was held that the charterers must pay; the contract was not frustrated or rendered illegal by the temporary and capricious restraint upon loading, imposed by the port authorities.

confectionery, f.o.b. to merchants in Liverpool, for export to Morocco. Delivery was to be made as soon as possible; the customary delivery period was six to eight weeks from the date of contract. On 5th August, by proclamation, the export of "provisions and victuals for food" was prohibited; on 10th August, by further proclamation, the term was defined as including confectionery of all kinds. By a further proclamation on 20th August, for the term "provisions and victuals for food," certain things not including confectionery were substituted. From 20th August, the export of confectionery was not forbidden; the prohibition lasted for ten, or at the most, fifteen days. For the time being, the buyers could not pay; the manufacturers, on 14th August, treated the contracts as discharged by operation of law. They sued for the price of goods sold and delivered; the buyers counter-claimed damages for non-delivery. Rowlatt, J., held that the contracts had been dissolved.

On appeal, it was contended for the buyers that an embargo upon export suspended, but did not annul, the contract; although export was prohibited, the obligation to supply remained. Since 20th August, business in confectionery had been carried on as usual. The only question was the reasonableness of the period of suspension; if the delay were so long as to frustrate the object of the contract, the contract would be at an end. The manufacturers argued that the contract at once became illegal; once dissolved it could not be reinstated.

Swinfen Eady, L.J., said that early in August it was obvious that the Government were acting from day to day: it was impossible to know whether the prohibition would last for any considerable period. A contract involving trading with the enemy becomes at once *ipso facto* illegal: a state of war is treated as of uncertain duration.<sup>1</sup> This was not such a contract. It was the duty of the manufacturers to wait a reasonable time to see if it were possible to fulfil their contracts. If they had waited, the contract, without difficulty, could have been performed. The suspension by embargo was short and temporary; the manufacturers were not entitled to repudiate.<sup>2</sup>

Bray, J., cited a passage from Abbott on *Ships and Seamen*<sup>3</sup>:—

"But although contracts of this nature are dissolved by the breaking out of war or hostilities . . . of which no person can foresee the determination; yet they are not dissolved by an embargo or temporary restraint of their performance imposed by the Government of the country in whose ports the vessel

<sup>1</sup> See *Horlock v. Beal* [1916] 1 A.C. 486, 507, 510, *per* Lord Shaw; *supra*, 480.

<sup>2</sup> [1916] 1 K.B., at 414, 415, citing, *inter alia*, *Hadley v. Clarke*, 8 T.R. 259, *supra*. See also *per* Warrington, L.J., at 416, 417. McNair, 163, 164.

<sup>3</sup> 14th ed., p. 874; [1916] 1 K.B., at 418. See the criticism of Bailhache, J., in *The Anglo-Northern Trading Case* [1917] 2 K.B. 78, 85; *supra*, 480, note 2.

may happen to be, as a measure of political caution in time of war, or upon the expectation of it, either in the lading port, or in a place at which the ship may have touched in the course of her voyage."

#### 4. UNQUALIFIED CONTRACT FOR UNASCERTAINED GOODS

"An ordinary and bare contract for the sale of unascertained goods gives no scope for the operation of the *Krell v. Henry*<sup>1</sup> rule, unless the special facts show that the parties have clearly (though impliedly) agreed upon a set of circumstances as constituting the contractual basis": *Blackburn Bobbin Case*.<sup>2</sup>

Early in 1914, bobbin manufacturers at Blackburn bought from timber merchants at Hull seventy standards of Finland birch timber; deliveries to begin about June or July, 1914, and to continue during the season until November. The contract contained no *exceptions*. Before the war, timber was loaded into vessels at ports in Finland for direct sea carriage to English ports. Until August, 1914, no deliveries under the contract had been made. Upon the outbreak of war, imports from Finland ceased. Transport was paralysed and the merchants found it impossible to deliver in accordance with their bargain. English timber merchants do not hold stocks of Finnish timber. The bobbin company did not know that Finnish timber was shipped direct from Finland, nor did they know that English timber merchants do not hold stocks of Finnish timber. In July, 1916, the bobbin company asked for delivery; the timber merchants then, *for the first time*, asserted that the contracts had been dissolved by the outbreak of war. The company thereupon claimed damages for non-delivery. The contract, it was held, had not been dissolved; the merchants were liable for damages.

The judgment of McCardie, J., is a short and outstanding treatise on frustration. The *Krell v. Henry* rule,<sup>3</sup> should "not be unduly extended. It is only in exceptional cases that it can be safely applied."<sup>4</sup>

The question at issue was this: "When will a change of circumstances (not due to the default of either party) cause a dissolution of contract"? The law was "undoubtedly in

<sup>1</sup> [1903] 2 K.B. 740, *supra*, 467.

<sup>2</sup> *Blackburn Bobbin Co. v. T. W. Allen & Sons* [1918] 1 K.B. 540, 551, *per* McCardie, J., affirmed [1918] 2 K.B. 467. See also statement of Buckmaster Committee (1918), Cd. 8975, cited in (1939), Cmd. 6100. "Impossibility for this purpose means commercial impossibility. Mere increased cost of performance, unless to an enormous and extravagant extent, does not make it impossible. A man is not prevented from performing by economic unprofitableness, unless the pecuniary burden is so great as to approximate to physical prevention." See *Jacob Baenziger v. Hazan & Co.* (1919), 1 Ll. L. Rep. 51.

<sup>3</sup> [1903] 2 K.B. 740, *supra*, 467.

<sup>4</sup> [1918] 1 K.B., at 551.

process of evolution."<sup>11</sup> But the *principle should be the same* whether the case were one of charterparty, building contract, or sale of goods; the application may vary with the terms and subject-matter of the contract.

(a) *Progressive modifications of Absolute Liability*

The principle of *Paradine v. Jane*<sup>2</sup> was "applied with full severity during the eighteenth century"<sup>3</sup>—despite grave and un contemplated change of circumstances. *Baily v. De Crespigny*<sup>4</sup> was not a true modification, for an "Act of Parliament took away from both parties the subject-matter of the contract. The rights of each were destroyed and nothing was left upon which the contract could operate. There was more than a change of circumstance; there was a statutory seizure of the contract property."<sup>5</sup> The first "true modification of the original rule" was the doctrine of *commercial frustration*—best stated by Brett, J., in *Jackson's Case*,<sup>6</sup>

"a mere application to commercial adventures of a broad contractual principle."

The next true modification was the decision in *Taylor v. Caldwell*,<sup>8</sup> where, upon the destruction of the subject-matter, the contract was dissolved. The doctrine of *Taylor v. Caldwell* was "still more strikingly enlarged" by the Coronation Cases: in *Krell v. Henry*,<sup>9</sup> it was held that—

"a collateral, though important, circumstance was the basis of the contract between the parties, and that when the basis ceased, it followed that the contract was dissolved."<sup>10</sup>

That case had been "frequently cited and adopted in the highest tribunal."<sup>11</sup> The explanation of that case and of the cases on commercial frustration had been clearly put by Lord Shaw in *Horlock v. Beal*<sup>12</sup> and by Viscount Haldane in the *Tamplin Case*.<sup>13</sup>

<sup>1</sup> [1916] 1 K.B., at 542. See also *per* Pickford, L.J., in *Hulton & Co. v. Chadwick and Taylor* (1918), 34 T.L.R. 230, 231.

<sup>2</sup> (1647), Aleyn 26; *supra*, 458.

<sup>3</sup> [1918] 1 K.B., at 543.

<sup>4</sup> (1869), L.R. 4 Q.B. 180, *supra*

<sup>5</sup> [1918] 1 K.B., at 543.

<sup>6</sup> (1873), L.R. 8 (C.P. 572, 581; *supra*, 475.

<sup>7</sup> [1918] 1 K.B., at 544; see *Tamplin Case* [1916] 2 A.C. 397, 404.

<sup>8</sup> (1863), 3 B. & S. 826; *supra*, 459.

<sup>9</sup> [1903] 2 K.B. 740; *supra*, 467.

<sup>10</sup> [1918] 1 K.B., at 544.

<sup>11</sup> It has also been criticised. See *The Constantine Case* [1942] A.C. 154, 164, *per* Viscount Simon, L.C., and Lord Wright, *Legal Essays and Addresses*, 256.

<sup>12</sup> [1916] 1 A.C. 512: "The underlying *ratio* is the failure of something which was at the basis of the contract in the mind and intention of the contracting parties."

<sup>13</sup> [1916] 2 A.C. 397, 406, 407: "The occurrence itself . . . may be of a character and extent so sweeping that the foundation of what the parties are deemed to have had in contemplation has disappeared and the contract itself has vanished with that foundation."

Thus, "The *Krell v. Henry*<sup>1</sup> rule as now formulated "is theoretically capable of application to all contracts."<sup>2</sup>

But what are the *limitations* of the rule? The "mere continuance of peace" is not a condition of a contract; "the destruction of a state of peace is not of itself a destruction of any specific set of facts within the *Krell v. Henry* rule."

"Nor can it be that grave difficulty on the part of a vendor in procuring the contract articles will excuse him from the performance of his bargain."<sup>3</sup>

*Jacobs, Marcus and Co. v. Crédit Lyonnais*<sup>4</sup> "has remained unchallenged amidst the testing breadth of recent decisions."<sup>5</sup>

#### (b) *Applications of Krell v. Henry Rule*

The *Krell v. Henry* rule,<sup>6</sup> McCardie, J., continued, had been applied (before or after 1903)—broadly, but not exhaustively—to five classes of cases.<sup>7</sup> *First*, "where British legislation or Government intervention has removed the specific subject-matter of the construction from the scope of private obligation."<sup>8</sup> *Secondly*, where "the actual and specific subject-matter of the contract" has ceased to exist.<sup>9</sup> *Thirdly*, "where a specific set of facts directly affecting a specific subject-matter has ceased to exist."<sup>10</sup> *Fourthly*, "where a specific set of facts collaterally only affecting a specific subject-matter but yet constituting the basis of contract, has ceased to exist."<sup>11</sup> *Fifthly*, where "British administrative intervention" has operated so as "to transform the contemplated conditions of performance" of a contract for a specific work."<sup>12</sup>

#### (c) *Unascertained Goods ; "Most Special Facts"*

After analysing certain authorities dealing with contracts for

<sup>1</sup> [1903] 2 K.B. 740, *supra*, 467.

<sup>2</sup> [1918] 1 K.B., at 545.

<sup>3</sup> [1914] 1 K.B., at 545, 546. See *per Lord Sumner in the Larrinaga Case* (1923), 29 Com. Cas. 1, 19.

<sup>4</sup> (1884), 12 Q.B.D. 589, 693, *per* Bowen, L.J. "Now one of the incidents which English law attaches to a contract is that (except in certain excepted cases as that of common carriers and bailees . . .) a person who expressly contracts absolutely to do a thing not naturally impossible, is not excused for non-performance because of being prevented by *vis major*."

<sup>5</sup> [1918] 1 K.B., at 551.

<sup>6</sup> [1903] 2 K.B. 740, *supra*, 467.

<sup>7</sup> [1918] 1 K.B., at 547, 548. Italics, in the following citations, are the author's.

<sup>8</sup> Thus, *Baily v. De Crespigny* (1869), L.R. 4 Q.B. 180.

<sup>9</sup> Thus, *Taylor v. Caldwell* (1863), 3 B. & S. 826. McCardie, J., thought that *Horlock v. Beal* [1916] 1 A.C. 486, was another example.

<sup>10</sup> Thus, *Jackson's Case* (1874), L.R. 10 C.P. 125; *Souter Case* [1917] 1 K.B. 222.

<sup>11</sup> Thus, *Krell v. Henry* [1903] 2 K.B. 740; *supra*, 467.

<sup>12</sup> *The Metropolitan Water Board Case* [1918] A.C. 119; *supra*, 493.

the sale of *unascertained goods*,<sup>1</sup> McCardie, J., came to the following conclusion:—

"In the absence of any question as to trading with the enemy, and in the absence also of any administrative intervention by the British Government authorities, a bare and unqualified contract for the sale of unascertained goods will not (unless most special facts compel an opposite implication<sup>2</sup>) be dissolved by the operation of the principle of *Krell v. Henry*,<sup>3</sup> even though there has been so grave and unforeseen a change of circumstance as to render it impossible for the vendor to fulfil his bargain."<sup>4</sup>

The decision was upheld in the Court of Appeal. Pickford, L.J., observed that, *on the facts*, the continuance of the normal mode of shipping the timber was not a matter contemplated by both parties as necessary for the fulfilment of the contract: the buyers did not know of the normal mode of transport.<sup>5</sup>

#### 5. SELLER'S INABILITY TO FINANCE EXPORT

Where, under a contract of sale, the buyer is not concerned with the general method whereby the seller finances his exports, and the contract contains provision for insurance of war risks in the event of war, the contract is not dissolved upon the inability of the seller to sell the exchange: *The Comptoir Case*.<sup>6</sup>

By pre-war contracts, the sellers (merchants at Antwerp) sold to the buyers (of New York) wheat to be shipped during August and early September, 1914, one contract to Rotterdam, the others to Antwerp. The contracts stipulated that in the event of war, the sellers should have the *right to cover war risk* for the account of the buyers; in the event of prohibition of export, blockade or hostilities *preventing shipment*, the contracts or any unfulfilled parts, should be at an end.

<sup>1</sup> *Jager v. Tolme & Runge* [1916] 1 K.B. 939, where the contract involved intercourse with the enemy (see *per* Swinfen Eady, L.J., at 950), *Grey & Co. v. Tolme & Runge* (1915), 31 T.L.R. 551, 553, *per* Bailhache, J., *Smith, Coney and Barrett v. Becker, Gray & Co.* [1916] 2 Ch. 86 (but see *per* Phillimore, L.J., at 99); *Hulton & Co v. Chadwick & Taylor* (1918), 34 T.L.R. 230.

<sup>2</sup> For a case involving "most special facts," see *In re Badische* [1921] 2 Ch. 331.

<sup>3</sup> [1903] 2 K.B. 740. See Lord Sumner's speech in the *Larrinaga Case* (1923), 29 Com. Cas. 1, 15.

<sup>4</sup> [1918] 1 K.B., at 550; author's italics. See *W. T. Sargent & Sons v. Eric Paterson & Co.* (1923), 15 Ll. L. Rep. 20, 22. There was an August contract for shipment of sultanas from Smyrna in September. The Turks entered Smyrna before the date of shipment. Trade with Turkey was permitted by proclamation, but shipping was disorganised. "There is no war, strike, or *force majeure* clause," said Rowlatt, J. "People have undertaken to sell these goods and to ship during the month from Smyrna. The goods are not forthcoming. There must be judgment in favour of the buyers."

<sup>5</sup> [1918] 2 K.B. 467, 470.

<sup>6</sup> *In re Comptoir Commercial Anversois & Power, Son & Co.* [1920] 1 K.B. 868. Followed in *Bassano Zucotti & Co. v. J. Carruthers & Co.* (1920), 3 Ll. L. Rep. 2, 5.

At the beginning of August, the sellers cabled to the buyers that they could not sell the draft, or cover war risk; they asked the buyers to arrange payment in New York. The buyers cabled that they could not do so, and on 6th August the sellers cancelled the contracts; they shipped the wheat to other buyers and at other ports. The buyers claimed damages and the dispute was referred to arbitration. The sellers contended that, since they could not sell in New York exchange on Rotterdam or Antwerp, they were "*prevented*" by hostilities from shipping to Rotterdam and Antwerp. It was not the custom of American shippers of grain to finance their own shipments to Europe; the custom of selling the exchange in America to a buyer of exchange was well known to the buyers. The buyers argued that there was no condition, express or implied, that the sellers should be able to sell exchange in America; and that they, the buyers, were not bound to pay in New York.

The arbitrators found the custom and the implied term, as contended by the sellers, and they found that at the date of the contracts the buyers knew of this custom; that, during the material period, the sellers were unable to sell exchange on Antwerp or Rotterdam; that no war insurance could have been effected; that the commercial purpose of the adventure became frustrated—"so far as the sellers were concerned"; and that shipment was "*prevented*" by hostilities.

(a) *Sale of Exchange, not Basis of Contract*

The buyer has no concern, said Bailhache, J., with the selling of exchange. The sale of exchange is simply the *method by which the seller finances the transaction*; nor does the buyer of exchange arise until the goods are shipped and insured, for he must have both the bill of lading and the insurance policies before he will buy the draft upon the buyer.<sup>1</sup>

"Now, . . . as used in this clause '*prevention*' means either physical or legal prevention. Inability to sell exchange is neither the one nor the other."<sup>2</sup>

Turning to the question of frustration: "Would the buyers and sellers in this case have both agreed that, if the sellers were unable to sell exchange, the contract was to be at an end?"<sup>3</sup> The only excuses specified in the contract were legal or physical and these were limited to shipment. The war risks clause "expresses the whole length to which both parties were prepared to go in common agreement."<sup>4</sup> *Impossibility of selling exchange* due to war would be an *equal inconvenience to the seller*. The arbitrators had found that the commercial purpose of the

<sup>1</sup> Bailhache, J., explains the process (see 877). Upon the similar practice in the cotton trade, see an exposition by Scrutton, L.J., in *Guaranty Trust Co. of New York v. Hannay & Co.* [1918] 2 K.B. 623, 659, 660.

<sup>2</sup> [1920] 1 K.B., at 877, 878.

<sup>3</sup> *Ib.*, at 879.

<sup>4</sup> *Ib.*, at 880.



adventure was frustrated "so far as the sellers were concerned." This finding did not go far enough; there must be "frustration of the common purpose of the adventure."<sup>1</sup>

On appeal, Bankes, L.J., said that the "so-called doctrine of frustration of the adventure" rested on an *implied condition* in the contract between the parties.<sup>2</sup> Whether the implication is to be made is a question of law for the court, upon the facts<sup>3</sup>; it must be a *necessary*, not merely a reasonable, implication.<sup>4</sup> The sale of exchange was a matter which concerned the seller only; with it the buyer had no concern.<sup>5</sup> "I cannot say," said Warrington, L.J., "that each party must have intended that the contract should be subject to such a term or condition."<sup>6</sup> "The possibility of war was contemplated, a certain provision was made in that event, and it was recognised that the sellers might not be able to effect a war insurance."

"In the face of this clause I find great difficulty in presuming that the parties intended that the whole contract should be at an end if in the event of war the sellers should be unable to sell the exchange by reason of their inability to effect a war insurance."

(b) *Implied Term; Necessary Implication*

"Economic unprofitableness is not 'prevention'," Scrutton, L.J., declared, "though a very high price for the article sold may be evidence of such a physical scarcity due to hostilities as amounts to prevention by hostilities."<sup>7</sup>

And later:

"The court, and not the jury, are the tribunal to find such a term; they ought not to imply a term merely because it would be a reasonable term to include if the parties had thought about the matter, or because one party, if he had thought about the matter, would not have made the contract unless the term was included; it must be such a necessary term that both parties must have intended that it should be a term of the contract, and have only not expressed it because its necessity was so obvious that it was taken for granted."<sup>8</sup>

<sup>1</sup> [1920] 1 K.B., at 881.

<sup>2</sup> *Ib.*, at 886. He cited Lindley, L.J., in *Turner v. Goldsmith* [1891] 1 Q.B. 544, 550, and Lord Sumner in the *Bank Line Case* [1919] A.C. 435.

<sup>3</sup> [1920] 1 K.B., at 890; see also, *per* Warrington, L.J., at 893; and *per* Scrutton, L.J., at 898, 899.

<sup>4</sup> See *per* Lord Fisher, M.R., in *Hamlyn & Co. v. Wood* [1891] 2 Q.B. 488, 491.

<sup>5</sup> [1920] 1 K.B., at 888, and 894, *per* Warrington, L.J.

<sup>6</sup> [1920] 1 K.B., at 895.

<sup>7</sup> *Ib.*, at 898.

<sup>8</sup> *Ib.*, at 899, 900; the "implied term" in its proper sense. See also the exposition by Scrutton, L.J., in *Reigate v. Union Manufacturing Co. (Ramsbottom)* [1918] 1 K.B. 592, 605: "These principles, however, have been clearly established. The first thing is to see what the parties have expressed in the contract; and

Inability to sell exchange from *every* cause could not have been included—for example, from the insolvency of the seller or financial panic on the market: “can either party insist on the contract being at an end, if exchange cannot be sold?”<sup>1</sup> Could the buyer refuse the goods if exchange could not be sold? “How can the court say that the parties to the contract must necessarily have agreed on such a term, and what is the exact wording and extent of the term on which they must have agreed?”<sup>2</sup> The parties contemplated inability to effect war risk insurance, but said nothing of the effect of that inability upon the contract.

“It seems to me one thing to say that the buyer knew that the seller usually made his financial arrangements in a particular way, and quite a different thing to say that the buyer agreed that the contract should be off if the seller could not make his usual financial arrangements.”<sup>3</sup>

#### 6. REFUSAL OF LICENCE: BUILDER'S DELIBERATE DELAY

Where, a licence being required from a Government department to proceed under a building contract, a builder applies for such licence, but ceases to proceed with due diligence with the deliberate intention and effect of ensuring the refusal of the licence, he cannot take advantage of the intervention of the Government department, which is brought about by his own act, and is liable in damages: *Mertens Case*.<sup>4</sup>

In February, 1916, the plaintiff bought land for the purpose of erecting a house. In May, 1916, he entered into an agreement with a builder to erect a house for £1,900—a very low figure—to be completed within six months after the plans were passed

then an implied term is not to be added because the court thinks it would have been reasonable to have inserted it in the contract. *A term can only be implied if it is necessary in the business sense to give efficacy to the contract*, that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated someone had said to the parties, ‘What will happen in such a case,’ they would *both* have replied, ‘Of course, so and so will happen; we did not trouble to say that; it is too clear.’ Unless the court comes to some such conclusion as that, it ought not to imply a term which the public themselves have not expressed” (author’s italics). And see the propositions formulated by Scrutton, L.J., in *Lazarus v. Cairn Line* (1912), 17 Com. Cas. 107, 113.

This exposition relates to an “implied term,” properly so called. It was unsuccessfully sought to imply a term in a contract of agency for seven years, that the company could terminate the agency at any time by ceasing to carry on their business. *The doctrine of frustration* is concerned with a state of affairs where the parties had no intention at all about the events that have happened, but where the court presumes that they had, and in order to achieve justice, decides that the contract is dissolved. It is submitted that Scrutton, J.’s exposition does not provide a juristic basis for frustration.

<sup>1</sup> [1920] 1 K.B., at 900.

<sup>2</sup> *Ib.*, at 900, 901.

<sup>3</sup> *Ib.*, at 901.

<sup>4</sup> *Mertens v. Home Freeholds Co.* [1921] 2 K.B. 526: cf. *The Constantine Case* [1942] A.C. 154, 189, per Lord Wright; *supra*, Chap. XIX. And see *Maud v. Sanders* (1943), 2 All E.R. 783, per Lewis, J.

by the council. If the builder should fail to proceed with due diligence, the employer could give notice requiring that the work be proceeded with, and with dispatch. In July, the plans were passed. An order was subsequently made by the Minister of Munitions prohibiting any person from carrying on building work without a licence. Where a first application had been made and was pending in respect of work already begun, such work could be continued until the licence was refused. The builder applied for a licence in July, and worked well until August, when he ceased to proceed with due diligence. In September, the plaintiff's architect gave him notice to proceed; before the expiry of that notice, licence to proceed was refused.

The plaintiff sued for damages for breach of contract, claiming £3,000, the sum estimated to finish the house. The builder had done work to the value of £496, and he contended that on refusal of the licence, he was discharged from further performance of the contract. The Official Referee reported that the failure to carry out the agreement was caused not by the refusal of the licence, but by the builder's deliberate failure to proceed with due diligence—knowing that he had a bad bargain—in order to evade his contract. To complete the house would have cost £4,153. The damages, deducting the contract price, the value of work done and the amount paid, were awarded at £2,583. Appeal was brought on the question of damages and the order of the Official Referee was restored.<sup>1</sup> Lord Sterndale, M.R., observed:—

“ . . . it has never been held that a man is entitled to take advantage of circumstances as a frustration of the contract if he has brought those circumstances about himself.”<sup>2</sup>

Where, in *Taylor v. Caldwell*,<sup>3</sup> the music hall was destroyed,

“ I do not think any authority has gone so far as to decide that if the defendant had burned down the music hall himself, he would have been entitled to say the subject-matter was gone and the contract was frustrated . . . ”<sup>4</sup>

## 7. LAWFUL REQUISITION ; LESSEE LIABLE

Where, during the currency of a lease of a house and grounds, the military authorities lawfully take possession of the house and remain in possession until after the expiration of the term, and before the term expires the house is destroyed by fire, the

<sup>1</sup> *Id.*, at 535, following *Hurt v. Hahn*, 61 Missouri, 496, cited in Hudson, *Building Contracts*, 4th ed., vol. I, p. 491.

<sup>2</sup> [1921] 2 K.B., at 536. See also *per* Lord Sumner in the *Bank Line Case* [1919] A.C. 435, 442; *per* Lord Wright in the *Maritime National Fish Case* [1935] A.C. 524, 530; *per* Viscount Simon, L.C., in the *Constantine Case* [1942] A.C. 154, 160; and *per* Lord Wright, *ib.*, at 195.

<sup>3</sup> (1863), 3 B. & S. 826.

<sup>4</sup> [1921] 2 K.B., at 536, 537.

*lessee* has not been evicted by title paramount, and remains *liable* both for the *rent* and to *reinstate* the house after the fire within a reasonable time of the end of the term; temporary occupation by the military authorities does not excuse him from his contractual duty to repair: *Matthey v. Curling*.<sup>1</sup>

In January, 1918, the Military authorities had taken possession of the demised premises (which had been assigned), to house German prisoners of war. In February, 1919, the house was destroyed by fire. On 25th March, 1919, twenty-one years' lease expired by effluxion of time. In June, 1919, possession of the ruins was formally relinquished by the military authorities.

An action was brought by the lessor against the tenant for damages for breach of covenant and for payment of rent for the quarter ending March, 1919. The defence was that performance of the covenants had become impossible in law and that there was an eviction by title paramount. Bailhache, J., gave judgment for rent, but held that requisition rendered performance of the covenants impossible.<sup>2</sup> The Court of Appeal (Atkin, L.J., dissenting) allowed the appeal, and their judgment was affirmed by the House of Lords.

Bankes, L.J., said that the doctrine of frustration did not apply; the executors of the assignee had continued in occupation of a great part of the demised premises and had paid rent for the whole.<sup>3</sup>

Atkin, L.J., pointed out that the *covenants to repair* involved "a continuing duty throughout the whole term."<sup>4</sup> How they could be performed with the occupation of the military he could not understand. Even after the house was burnt down, the military authorities still held possession:

"if performance of a covenant requires the right of access to property, that right of access is by law taken away, performance of the contract is *prima facie* rendered impossible. If I covenant to build on a field, the possession of which is lawfully taken from me, it does not appear necessary for my defence of non-performance that I should also have to prove that I asked the new possessor to be allowed to build on the field and that he refused permission."<sup>4</sup>

If the *obligation to reinstate* the premises if, during the term, they were destroyed, and "*forthwith*" to lay out in reinstate-

<sup>1</sup> [1922] 2 A.C. 180, approving the judgment of the Earl of Reading, C.J., in *Whithall Court, Ltd. v. Ellinger* [1920] 1 K.B. 680, 686, 687. This case is discussed and explained in *The Cricklewood Case* (1945), 61 T.L.R. 202, 204, 207.

During the present war—or, rather, from 24th August, 1939—no remedy for breach of repairing covenant may be enforced for damage occurring during a requisition of leaseholds. If, upon de-requisition, compensation becomes payable to the person entitled to the benefit of the covenant, no remedy for breach of the covenant will be enforced at any time. Landlord and Tenant (Requisitioned Land) Act, 1944, s. 1.

<sup>2</sup> [1920] 3 K.B. 608.

<sup>3</sup> [1922] 2 A.C., at 185, 186.

<sup>4</sup> *Ib.*, at 193.

ment the insurance moneys to be received—if this obligation were limited to the duration of the term—and in the absence of express words to the contrary, it should be so construed—it became impossible of performance.<sup>1</sup>

Atkin, L.J., agreed that, assuming the principle of frustration was applicable to such a contract, *on the facts* the contract was not determined. Comparing the period of military possession with the whole term, the fact that the right to occupation was in the assignee and not the tenant, and that the assignee continued to pay rent, thus creating against himself a tenancy by estoppel, the court should not infer an implied term that “in the events that happened the contract should come to an end.”<sup>2</sup> Atkin, L.J., added, however :

“ . . . it does not appear to me conclusive against the application to a lease of the doctrine of frustration that the lease, in addition to containing contractual terms, grants a term of years. Seeing that the instrument as a rule expressly provides for the lease being determined at the option of the lessor upon the happening of certain specified events, I see no logical absurdity in implying a term that it shall be determined absolutely on the happening of other events—namely, those which in an ordinary contract work a frustration.”<sup>3</sup>

He thought, however, that there was an eviction by title paramount from part of the premises.

Younger, L.J., observed that the doctrine of frustration had never yet been extended to a lease.<sup>4</sup>

Lord Buckmaster stated that the War Office had declined to accept liability for the damage caused by the fire<sup>5</sup> ; the lessor thereupon claimed against the lessee for non-payment of rent, and damages for breaches of covenant ; the entire cost was thus thrown upon one of two innocent parties. “ Eviction by title paramount means an eviction due to the fact that the lessor had no title to grant the term, and the paramount title is the title paramount to the lessor which destroys the effect of the grant . . . But mere eviction has never been held to have this effect.”<sup>6</sup> *Baily v. De Crespigny*,<sup>7</sup> did not apply to a covenant to pay rent or to deliver up premises ; there, the

<sup>1</sup> [1922] A.C., at 195, 196. But see *per* Lord Atkinson, at 240.

<sup>2</sup> *Ib.*, at 199.

<sup>3</sup> *Ib.*, at 200. Viscount Simon, L.C., and Lord Wright accepted this reasoning and expressed the view, in *The Cricklewood Case*, *infra*, that there was no reason why a lease should not be determinable by a frustrating cause.

<sup>4</sup> *Ib.*, at 210.

<sup>5</sup> *Ib.*, at 226, criticising their attitude. Under the Compensation (Defence) Act, 1939, s. 2 (1) (b), a requisitioning authority is liable for the cost of making good damage which occurs to land or buildings while they are under requisition, “ fair wear and tear ” and “ war damage ” only, excepted.

<sup>6</sup> *Ib.*, at 227.

<sup>7</sup> (1889), L.R. 4 Q.B. 180 ; *supra*, 465.

Legislature had created a new kind of assign which was not in the contemplation of the parties. Here, the lessee "has bound himself to do these definite acts, and it is no excuse that circumstances which he could not control have happened and have prevented his compliance."<sup>1</sup>

"Impossibility of performance is a phrase that is often lightly and loosely used in connection with contractual obligations . . . no law has prohibited performance, though enjoyment of the premises has been interfered with by legal powers."<sup>2</sup>

Lord Atkinson refers to Lord Ellenborough's judgment in *Atkinson v. Ritchie*,<sup>3</sup> stating the rule in *Paradine v. Jane*.<sup>4</sup> Willes, J., he said, expressly approved the principle that—

"by the common law of England a person who expressly contracts absolutely to do a thing not naturally impossible is not excused from non-performance because of being prevented by the act of God or the King's enemies."<sup>5</sup>

Thus, also Bowen, L.J.<sup>6</sup> Lord Atkinson declared that the case of *Paradine v. Jane* "must . . . be recognised as one of well-established authority."<sup>7</sup> He expressly approved the decision in *Whitchall Court, Ltd. v. Ettlinger*.<sup>8</sup>

#### 8. COMPULSORY ACQUISITION BY LOCAL AUTHORITY

Where the lessees of an hotel contract with advertising agents whereby the latter are entitled to erect and exhibit, for a term of years, upon the roof of the hotel, electrically illuminated advertisements, but before the expiration of the term the local

<sup>1</sup> [1922] 2 A.C., at 228.

<sup>2</sup> *Ib.*, at 230. See Lord Wright's exposition of Lord Buckmaster's speech, in *The Cricklewood Case* (1945), 61 T.L.R. 207. In his view, Lord Buckmaster never suggested that frustration could not be applied to a lease.

<sup>3</sup> (1809), 10 East 530, 533.

<sup>4</sup> (1647), Aleyn 26; *supra*, "if the lessee covenant to repair a house, though it be burnt by lightning, . . . yet he ought to repair it", *supra*, 458.

<sup>5</sup> [1922] 2 A.C., at 234, citing *Lloyd v. Guibert* (1865), L.R. 1 Q.B. 115, 121. But this passage is *obiter*, and the only authority cited is *Paradine v. Jane*, in 1665, *Taylor v. Caldwell* had only recently introduced the new principle.

<sup>6</sup> *Jacobs, Marcus & Co. v. Crédit Lyonnais* (1884), 12 Q.B.D. 580, 603.

<sup>7</sup> [1922] 2 A.C., at 235. It is submitted that these dicta of Lord Ellenborough, C.J., Willes, J., and Bowen, L.J., can no longer be accepted as a correct statement of the present law. See Scrutton, 116. "After the decision in *Taylor v. Caldwell* and the subsequent cases which have so extended the application of the principle there enunciated . . . the passage in *Atkinson v. Ritchie* seems to have lost much of its foundation. Yet subsequently to *Taylor v. Caldwell* it continues to be quoted without qualification, e.g., in *Jacobs, Marcus & Co. v. Crédit Lyonnais* and more recently by Lord Atkinson, in *Matthey v. Curling*."

See *per* Lord Wright, in *The Cricklewood Case* (1945), 61 T.L.R. 206.

<sup>8</sup> [1920] 1 K.B. 680, 686, *per* Earl of Reading, C.J. Lord Russell of Killowen and Lord Goddard followed Lord Atkinson's opinion. *The Cricklewood Case* (1945), 61 T.L.R. 205, 208.

authority, under statutory powers in existence before the date of the contract, serve the lessees with a notice to treat and demolish the hotel accordingly, the lessees are liable for damages for breach of contract : *The Walker & Homfrays Case*.<sup>1</sup>

Two such contracts were made for seven years from 1924, the advertisers having an option to renew. The advertisers were to pay £100 per annum for the privilege of fixing and exhibiting the signs during the continuance of the agreement. In 1925 the local corporation, in exercise of powers under an Act of 1920, served a notice to treat. In 1928 an arbitrator assessed the compensation to be paid by the corporation to the lessees of the hotel, including £450, being four and a half years' purchase of rent in respect of the sign. In 1929 the corporation began to demolish the hotel. In 1930, by agreement with the advertisers, the sign was removed by the corporation. The advertisers paid the lessees the rent down to the end of 1929 ; prevented from maintaining the sign until 1931, they successfully sued the lessees for damages for breach of contract.

Bennett, J., did not think that if the parties, at the time of the contracts, had discussed the possibility of compulsory acquisition, provisions would have been inserted enabling the lessees, without getting any return, to retain rents already paid. It was not possible to say that both parties *must* have made their bargain upon the footing that upon compulsory acquisition of the hotel the contracts were to be dissolved. The decision was affirmed on appeal.

The lessees knew, said Lord Hanworth, M.R., that their premises might be taken : the advertisers had no such knowledge. The lessees could have provided against the risk after 1925, when vacant possession might have been required.

"The court is not very ready to imply subsidiary additions to an agreement made between parties and, in the absence of such implication, the law as stated in *Paradine v. Jane*<sup>2</sup> still applies. The parties must, if they desire to be safeguarded against subsequent contingencies, provide for them in their agreement. If they do not do so, but have entered into a contract in terms which are absolute, those terms must be carried out unless in the somewhat rare cases where it can be found that there was an implied understanding on both sides that the basis of the contract was the continued existence of an essential matter to the contract."<sup>3</sup>

<sup>1</sup> *Walton Harvey, Ltd. v. Walker & Homfrays, Ltd.* [1931] 1 Ch. 145, 274.

<sup>2</sup> (1647), Aleyn 26 ; *supra*, 458.

<sup>3</sup> [1931] 1 Ch., at 282. This statement is too narrow, and ignores the current of authority upon frustration. But the war had long since passed, and in 1935 Lord Wright himself declared : "This doctrine received some extension owing to the very special exigencies of business consequent on war contracts : since those conditions have ceased the tendency has been to limit the rule once more" (*Legal Essays*

and *Addresses*, 254, 255; author's italics). It is submitted, with respect, that the doctrine in the war-time cases was not a temporary extension but a legitimate and permanent development of the law. This view is borne out by Lord Wright's speech in *The Constantine Case* [1942] A.C. 154, 183, 193.

(a) In *Livock v. Pearson Brothers* (1928), 33 Com. Cas. 188, manufacturers sold waterproof coats to retailers upon condition that they were not to be resold below a specified price. After business had thus been carried on between the parties for three years, the defendants, without giving the plaintiffs notice, began to sell goods direct to the public at a price lower than that which the plaintiffs, by their contract, were bound to charge. The plaintiffs were left with the defendants' goods on their hands. They claimed damages on the ground that a term must be implied in the contract that the defendants would not *themselves* sell the goods to the public at a price below that which the plaintiffs were bound to charge, or at least that, before doing so, they would give the plaintiffs sufficient notice of their intention, to enable the plaintiffs to dispose of the goods at a profit. Branson, J., held that *no such term could be implied* in the contract. "Though such a term would have been reasonable . . . I entirely fail to see that any such term is so obviously necessary for the business efficacy of this contract that if the suggestion had been made at the time when the contract was being entered into, both parties would have immediately said, 'Oh, there is no need really to put that in because it is so abundantly clear'" (at 194).

(b) In *Broome and Broome and Green, Ltd. v. Pardess Co-operative Society of Orange Growers* (1900), *Ltd.* (1940), 45 Com. Cas. 151; 109 L.J.K.B. 571, orange growers in Palestine had employed fruit brokers of Covent Garden to sell oranges on commission. The brokers paid the growers £15,000, a *guaranteed advance* of 7s. 6d. per case (*which could not be reclaimed*), in respect of a consignment of 40,000 cases of oranges of Orphir brand. The growers had a very high reputation and there was a very strict inspection in Palestine to prevent the shipment of inferior fruits. When shipped, the oranges were apparently in good condition and they received an official certificate of soundness from the Fruit Inspection Service of the Palestine Government. Owing to an abnormally wet season, on arrival in England, an excessive amount—40 per cent.—were decayed and worthless. The brokers lost both their prospective profit and the guaranteed advance. They claimed damages from the growers, saying that a term must be implied into the contract that the oranges must be sound and merchantable *on arrival*. Hilbery, J., gave them judgment: (1939), 108 L.J.K.B. 804, 811.

" . . . what the parties would have read into the contract if they had been asked about it, would be that the defendants should supply during the season 40,000 cases of oranges Orphir brand, f.o.b. Palestine in such a condition as to be saleable as Orphir brand oranges on the London market of merchantable quality, save for the usual 5 per cent. lost in repacking."

The Court of Appeal held that *no such term* could be implied; it was not necessary in the business sense to give efficacy to the contract. MacKinnon, L.J., said that the plaintiffs took the risk of any failure in selling the goods, to realise the full amount of their guaranteed advance (45 Com. Cas., at 156).

One "fairly obvious and considerable difficulty" was that of "formulating the wording" in the pleadings (at 159). The plaintiffs had "two tries at it." In the amendment, a margin of 5 per cent. was excluded from the category of sound oranges. Could the plaintiffs establish that this condition was one "on which the parties both clearly contracted"? (45 Com. Cas., at 161). MacKinnon, L.J., was unable to come to the conclusion that the parties would have agreed: "Of course, if there are more than 5 per cent. of bad oranges, we" (the defendants) "shall have to make it good to you." The defendants would have said: "But the whole basis of this contract is that you are to run the risk of the cost of repacking bad oranges; we have provided for that in the contract."

This conclusion, it is submitted, is unsound. It is far off from that successful argument submitted by Mr. F. D. MacKinnon, K.C., in *The Souter Case* [1917] 1 K.B. 222, 229, and in the *Bank Line Case* [1919] A.C. 435, 437.



## 9. REFUSAL OF LICENCE THROUGH CHARTERERS' ELECTION

Where, a licence being required for a chartered trawler and the Minister intimating that only three licences can be granted, the charterers name three trawlers, excluding the trawler in question, the charterparty is not frustrated; the absence of licence is due to the charterers' election, and they remain liable for the hire: *The Maritime Fish Case*.<sup>1</sup>

The charter of the *St. Cuthbert*—which could only operate with an otter trawl—was made in Nova Scotia in October, 1928, for twelve calendar months, to continue from year to year unless terminated by three months' notice from either party, such notice to take effect at the end of one of the years. The trawler was to be employed in the fishing industry only. In 1932 the parties entered into a new agreement, the hire to be lower than that previously paid. In January, 1933, the charterers gave notice that they did not intend to renew the charter. When the parties made the new agreement in 1932, *they knew of Canadian legislation* making it an offence to leave any Canadian port in order to fish with a vessel using an otter trawl, except under licence from the Minister of Fisheries. In addition to the *St. Cuthbert*, the charterers operated four similar trawlers. In March, 1933, they duly applied for licences and were informed that licences would be granted for *three only of the five trawlers*. The named three trawlers: the *St. Cuthbert* was not included and she received no licence. From April, 1933, it was no longer lawful to employ her. In May, the charterers gave notice that she was available for redelivery and they contended that they were no longer bound by the charter. The owners claimed the hire due from May until October, 1933. The main defence was that through no fault of the charterers, the contract, after April, became impossible of performance and that the charterers were discharged from their obligations.

Lord Wright, delivering the advice of the Judicial Committee, distinguished the *Bank Line Case*<sup>2</sup>; there, the chartered vessel was taken from the shipowners for such a period as to defeat the contemplated adventure and to prevent them from placing her at the charterers' disposal. The *St. Cuthbert* was not requisitioned; the owners did not warrant the continued availability of the vessel for fishing; she was available to the charterers "to make such use of her as they desired and were able to make."<sup>3</sup> The case was more analogous to *Krell v. Henry*,<sup>4</sup> where it was held that "the contract was dissolved, because the basis of the contract was that the procession should

<sup>1</sup> *Maritime National Fish, Ltd. v. Ocean Trawlers, Ltd.* [1935] A.C. 524.

<sup>2</sup> [1919] A.C. 435; *supra*, 495.

<sup>3</sup> [1935] A.C., at 528.

<sup>4</sup> [1903] 2 K.B. 740; *supra*, 467.

take place as contemplated." But "the correctness of that decision has been questioned."<sup>1</sup>

In the present case, although the possibility of a failure to obtain a licence was known to both parties when the contract was made, the contract was absolute.

"In such a case as the present it may be questioned whether the court should imply a condition resolute of the contract (which is what is involved in frustration) when the parties might have inserted an express condition to that effect but did not do so, though the possibility that things might happen as they did, was present to their minds when they made the contract."<sup>2</sup>

This point was not fully argued or determined on the appeal affirming the judgment of the Supreme Court of Nova Scotia; the appeal could be decided on the simple ground that it was "the act and election" of the charterers which prevented the *St. Cuthbert* from being licensed. The charterers were free to select any three of their five trawlers; they could have selected the *St. Cuthbert* as one, and obtained a licence for her: "it was their hand that guided the hand of the Minister in placing the licences where he did and thereby excluding the *St. Cuthbert*."<sup>3</sup>

"The essence of 'frustration' is that it should not be due to the act or election of the party."<sup>3</sup>

The loss of the licence

"can correctly be described, *quoad* the appellants, as 'a self-induced frustration.'"<sup>4</sup>

It happened "in consequence of their election";

"it was that election which prevented performance, and on that assumption it was the appellants' own default which frustrated the adventure; the appellants cannot rely on their own default to excuse them from liability under the contract."<sup>4</sup>

## B. ARISING OUT OF THE PRESENT WAR

### 1. INSUFFICIENT EFFORTS TO OBTAIN LICENCE

Sellers were not entitled to rely upon frustration by supervening operation of law unless they proved that they had made every possible effort—including pressure on the shipowners—to obtain a licence until the vessel chartered was ready to sail

<sup>1</sup> For example, by Lord Finlay, L.C., in the *Larrinaga Case* (1922), 29 Com. Cas. 1, 9.

<sup>2</sup> [1935] A.C., at 529. Does not this observation, with great respect, go too far? The observation is *obiter*, upon which, see *Legal Essays and Addresses*, 345.

<sup>3</sup> [1935] A.C., at 530, citing an *obiter dictum* of Lord Sumner in the *Bank Line Case* [1919] A.C. 435, 452. See also *The Constantine Case* [1942] A.C. 154, 161, *per* Viscount Simon, L.C.; at 189-191, *per* Lord Wright; and at 200-202, *per* Lord Porter; *supra*, 532, 537-539.

<sup>4</sup> [1935] A.C., at 531.

upon the chartered voyage : *Bakubhai & Ambalal, Ltd. v. South Australian Farmers' Co-operative Union, Ltd., of Adelaide*.<sup>1</sup>

In August, 1939, B Ltd. bought from the Union 7,000 tons of South Australian wheat. In October, 1939, the Union purported to cancel the contract, and B Ltd. claimed £15,000 damages. The cargo was to have been shipped—expected ready to load, 10th October—on the ss. *Uganda* from South Australia to one safe port in *Kathiawar*, to be declared on loading; should fulfilment of the contract be rendered *impossible by prohibition of export*, blockade or hostilities, the contract, or any unfulfilled part, should be cancelled. Before the contract was made, the sellers had entered into a charterparty in London on the Chamber of Shipping Australian Grain Charter form for the *Uganda* for carriage to one or more of a wide range of ports (including the *Kathiawar Peninsula*). Clause 28 provided: "If the nation under whose flag the vessel sails shall be at war whereby the free navigation of the vessel is endangered, or in case of blockade of or *prohibition of export* from the loading port, this charter shall be null and void at the last outward port of delivery or at any subsequent period when the difficulty may arise, previous to cargo being shipped." Under the Control of Trade by Sea Order, 1939, the *Uganda* could not proceed to sea except under licence, but the owners were informed that it was not intended, save exceptionally, to interfere with any current lawful voyage. The owners applied for a licence to carry out the charterparty with its full range of discharge ports. This application was refused, but it was understood that if a new application were made for a licence to load wheat from South Australia to the *United Kingdom*, the application would be favourably considered. The sellers, however, purported to cancel the contract under cl. 28, and the shipowners cancelled the charterparty.

The Umpire found that if an application for a licence had been received in stronger terms, supported by evidence of famine in *Kathiawar*, the prospects of a licence would have been enhanced. The shipowners were not entitled to cancel the charterparty and the sellers should have resisted this contention. They acted prematurely in purporting to cancel, in reselling to other buyers for shipment to the *United Kingdom*. The Umpire awarded £13,000 damages subject to the opinion of the court on the point of law. His view was that the sellers "could not rely upon frustration by supervening operations of law, unless they could show that they had made every possible effort, including pressure upon the shipowners to make every possible efforts to obtain a licence, and had persisted in such efforts until the *Uganda* was ready to sail from Sydney upon her chartered voyage."<sup>2</sup>

<sup>1</sup> (1941), 69 Ll. L. Rep. 138, per Viscount Caldecote, C.J.

<sup>2</sup> *Ib.*, at 144.

With this statement of the sellers' duty, Viscount Caldecote, C.J., agreed.<sup>1</sup>

## 2. FAILURE TO OBTAIN TONNAGE

Even if it was impossible to obtain tonnage in the usual way, the plaintiffs were not thereby discharged from their duty to perform the contract: *Jute & General Products, Ltd. v. Simon and Co.*<sup>2</sup>

The plaintiffs claimed a declaration that a c.i.f. contract made in June, 1939, by which they sold 100 tons of Rumanian Yellow Victoria peas to be delivered in September, 1939, was not binding through *impossibility of performance*, or, alternatively, that the contract had become impossible through the *prohibition of exports*, blockade or hostilities, and was therefore *cancelled* under the terms of the contract. The defendants had sold the peas to the third party, who sold them to the fourth party, and these sub-buyers were joined as parties.

During September, 1939, no freight was available from Braila (where the plaintiffs had appropriated peas to the contract), or any other Rumanian port, to London, and goods transport facilities on the railway had been prohibited by the Rumanian Government. It was usual in September for several ships to call at Braila and offer to take parcels of cargo to the United Kingdom. There was a conflict of evidence whether transhipment of cereals in bags was contemplated or usual. The contract contained the "prohibition of export" clause. Viscount Caldecote, C.J., said that frustration depended upon an implied term "as to what reasonable men must be taken to have intended when they made the contract. It is not what suits one party to say he would have wished if the state of things that happened had been in his mind, but what the object of the contract or the conditions of the contract must be taken to have been in the contemplation of both parties."<sup>3</sup>

The sub-buyers had said they were not concerned with the way in which the goods would be obtained.<sup>4</sup> The "implied condition" contended for would be "something like this":—

"In the event of the seller finding himself unable to obtain cargo space at the port at which he has goods appropriated for the performance of this contract, the contract is discharged. Now, if a clause of that kind had ever been suggested by the sellers to the buyers, I am confident that the buyer would not, as a reasonable man, have agreed to it, and having

<sup>1</sup> A similar question arose in *Anglo-Russian Merchant Traders, Ltd. v. John Batt and Co.* [1917] 2 K.B. 679; *supra*, 489.

<sup>2</sup> (1941), 70 Ll. L. Rep. 79.

<sup>3</sup> *Ib.*, at 82.

<sup>4</sup> Compare *Blackburn Bobbin Case* [1918] 1 K.B. 540; [1918] 2 K.B. 467, 469, *per* Pickford, L.J.; *supra*, 548.

regard to that view I think that no such implied condition can be assumed to be contained in the contract . . ."<sup>1</sup>

The plaintiffs had not proved that performance of the contract was impossible.

### 3. WHERE CONTRACTS OF SEAMEN NOT FRUSTRATED

Where seamen contracted to serve on a Finnish ship on a voyage "from Tampa, Florida, to a port in England or Africa and back to a final port in the United States of America," and the vessel, having sailed from Florida, reached Dublin, a neutral port, in October, 1941, and in November, 1941 (when Finland was treated as enemy territory), the master paid off the crew, the seamen, it was held, were dismissed in breach of their contracts; the voyage was not frustrated by impossibility of performance but by the negligence of the master and the desire of the agents to save expense; the seamen were entitled to arrears of wages and to expenses of repatriation to a port in the United States or other ports where re-employment might be reasonably available: *Herman's Case*.<sup>2</sup>

On 2nd August, 1941, diplomatic relations had ceased between Britain and Finland; on 5th December, 1941, war was declared. The shipowners pleaded an implied condition that Finland should not be at war, or in hostile relations, with Great Britain or any other nation, and that the ship should proceed under British warrant or protection. The contracts, it was contended, were discharged by impossibility of performance and frustration because the shipowners were unable to obtain from the British Ministry of Shipping a ship's warrant to enable the vessel to sail to an English port or to the United States.<sup>3</sup>

A British ship's warrant from August, 1940 to February, 1941, had been granted to the British agents; this protected the vessel from British seizure and granted access to commercial shipping facilities under British control. The warrant could be extended. The vessel arrived at Florida in March, 1941, when the warrant had expired; the master never applied to have it extended. The vessel did not sail until May, 1941. The British Ministry of Shipping in Tampa instructed the master to go to Charleston, South Florida, for bunkers. This he did, and there received from the British vice-consul the ship's British navicert dated 3rd August. Upon the voyage she lost her convoy, completed her voyage alone and arrived in Dublin in October, where she discharged her cargo. Meanwhile, on 2nd August, 1941, diplomatic relations between the British Government and

<sup>1</sup> 70 Ll. L. Rep., at 83. Viscount Caldecote, C.J., also referred to and followed *Ashmore & Son v. Cox & Co* [1899] 1 Q.B. 436.

<sup>2</sup> *Achilles Herman, Joseph Burns, Istvan Remeny and Constantin M. Nantsoos v. The Owners and Master of the ss. "Vicia"* [1942] 1 R. 305.

<sup>3</sup> *Ib.*, at 315.

Finland had ceased ; Finland was declared to be enemy-occupied territory ; and the moneys held by the British agents were "frozen" and placed in a new bank account under the control of the Custodian. The agents were granted a limited licence to continue the affairs of the vessel to enable her to complete the homeward voyage. War was not declared between Great Britain and Finland until 5th December, 1941. On 28th November, 1941, the master, upon the agents' instructions, paid off the crew, but the plaintiffs claimed compensation for breach of contract to carry them back to the United States.<sup>1</sup>

H, a Belgian, was first officer. His contract, dated July, 1941, was "a running agreement for a round trip from Tampa back to a final port in the United States of America, but subject to the conditions in the event of the ship being torpedoed, mined, or lost."<sup>2</sup> The contract of B, the second mate, contained the following clause :—

"In the event of the loss of the ship, through any cause whatsoever, indemnity to consist of four months' salary at 250 dollars, plus free transportation back to United States of America, country of embarkation, if feasible ; otherwise on another ship at the same rating and salary."

Hanna, J., held that "loss" meant "physical loss," and did not cover any impossibility.<sup>3</sup> R, the radio operator, a Hungarian, and N, the second engineer, a Greek, were under similar contracts, engaged in April, 1941.<sup>4</sup> The only perils "expressly contemplated" were torpedo, mine or loss of the ship. The shipowners had pleaded an implied term that if, because the ship had ceased to be available, it became impossible to take the seamen back to America, the contract became avoided by frustration. The "real defence" was that the shipowners had been unable to procure the necessary British ship's warrant for the return journey.<sup>5</sup>

Hanna, J., held that the master's failure to procure an extension of the British warrant was a dereliction of duty.<sup>6</sup>

The alleged frustration in Dublin, i.e., failure to obtain the British shipping warrant—was due to the neglect of the captain.

"If frustration had supervened, however, does frustration apply"—asks Hanna, J.—"to seamen's contracts for repatriation." "Seamen's contracts have always been regarded "in a peculiarly favourable position . . ." Would frustration put an end to the specific clause—of return to the United States of America ? This, said Hanna, J., is "an accrued right vested in the seamen under their contracts before the alleged frustration, . . . In my

<sup>1</sup> [1942] I.R., at 308-312, *per* Hanna, J.

<sup>2</sup> *Ib.*, at 312.

<sup>3</sup> *Ib.*, at 313, referring to *Horlock v. Beal* [1916] 1 A.C. 486, 493.

<sup>4</sup> *Ib.*, at 312, 313.

<sup>5</sup> *Ib.*, at 313.

<sup>6</sup> *Ib.*, at 315.

<sup>7</sup> *Ib.*, at 324.

opinion, this contract purports to be, and is, absolute both in terms and in fact as far as repatriation is concerned, which is an accrued right, vested in the seamen under their contracts before frustration."<sup>1</sup>

"Apart from the contract, however," said Hanna, J., seeking to distinguish *Honlock v. Beal*,<sup>2</sup> "it has always been recognised by the general maritime law that, if any seaman be discharged, whether lawfully or unlawfully, at a foreign port, he is entitled, in addition to wages due, to the expenses of repatriation. If it is an unlawful discharge, he may be entitled to a further measure of damages. Section 32 of the Merchant Shipping Act, 1906, makes a specific provision for a seaman on a British ship, who is discharged at a foreign port, and enacts that he is entitled to his maintenance and return to the proper return port."<sup>3</sup>

#### 4. "UNFORESEEN CIRCUMSTANCES EXCEPTED"

Where, in January, 1941, woollen manufacturers agreed to sell overcoating to clothing manufacturers, "Delivery as ready after June, 1941," and "strikes, breakdowns, or other unforeseen circumstances excepted," and the manufacturers, in an action for damages for failure to deliver, pleaded that a Limitation of Supplies Order, 1941, had made it illegal to fulfil the contract, and at the trial set up two new defences, *first*, that "unforeseen circumstances" excused performance, and *secondly*, that the order frustrated the contract, the court held that the circumstances were not "unforeseen" and that, since the contract might have been performed after 30th September, 1941, no frustration had supervened: *Leavey's Case*.<sup>4</sup>

Cassels, J., allowing evidence in support of frustration, had found in the defendants' favour: the sellers could not fulfil all the contracts they had on hand and the contracts were abrogated. The order came into operation in March, 1941,<sup>5</sup> and came to an end on 30th September, 1941, and it would have been necessary, said Greene, M.R., to scrutinise the

<sup>1</sup> [1942] 1 R., at 325.

<sup>2</sup> [1916] 1 A.C. 486; *ib.*, at 325, 326.

<sup>3</sup> *Id.*, at 328. At 326-328, Hanna J., cites decisions of Sir W. Scott: *The Exeter* (1799), 1 C. Rob. 173; *The Beaver* (1800), 3 C. Rob. 92; *The Madonna d'Ibra* (1811), Dods. 37, 40: "The parties must be subsisted till the return to their own country, unless some special reason is shown to the contrary": *The Elizabeth* (1819), 2 Dods. 403, 412. "They cannot discharge their crews in a foreign country on other terms than sending them home, and paying their wages up to the time of their actual arrival"; *The Eliza* (1823), 1 Hagg. 182, 186: "If the seaman had a right to quit the ship, . . . he had a claim upon the owners to be restored to his home . . ." *The Camilla* (1858), Swab. 312, 326, *per* Dr. Lushington, was also cited.

<sup>4</sup> *J. Leavey & Co., Ltd. v. George H. Hirst & Co., Ltd.* (1943), 2 All E.R. 581. (The report at [1944] 1 K.B. 24 deals with pleadings, and damages.)

<sup>5</sup> S.R. & O., 1941, No. 323,

contracts to see when they were to have been fulfilled and to investigate matters relating to licences.

Lord Greene said that "unforeseen circumstances" meant circumstances making the performance of the contract impossible: no such circumstances were proved.<sup>1</sup>

Upon the issue of frustration it was urged that the effect of the March order was to make it impossible to perform the contract: the contracts on hand exceeded the quota allowed. There were two answers: *First*, the order applied *until 30th September, 1941, only*; under this contract delivery need not have taken place until after that date.<sup>2</sup> *Secondly*, the *quota might be departed from "under the authority of a licence granted by the Board of Trade."* In July, 1941, the plaintiffs applied for a licence, which they obtained in October, 1941; the manufacturers, saying that their machinery was committed for months ahead, returned the licence.

### 5. LEASE OF FURNISHED HOUSE

Where, by an agreement made before the outbreak of war, a furnished house was let at a weekly rent, as from the outbreak of war (if it occurred) until cessation of hostilities, and, after the tenants had entered into possession and paid rent the house was *requisitioned*, frustration did not apply, and the tenants continued to be liable for the rent: *Swift v. Macbean*.<sup>3</sup>

The rent was £163 16s. per annum: compensation under Compensation (Defence) Act, 1939, was £25.<sup>4</sup>

It was conceded for the tenant that frustration did not apply to the demise of *unfurnished premises for a term of years*, but this, it was argued, was not such a demise. The beginning of the agreement was uncertain and equally was the date of its termination. Moreover, the agreement was *divisible*: part was a contract for a demise of the premises and part a contract for the possession of the furniture. The latter contract frustrated, the whole agreement was at an end.<sup>5</sup>

For the landlord it was contended that for this purpose *no distinction* existed between the letting of furnished and unfurnished premises. Nor was the agreement divisible:

<sup>1</sup> (1943), 2 All E.R. 583, approving the view of Greer, J., in *George Wills & Sons, Ltd. v. R. S. Cunningham, Son & Co., Ltd.* [1924] 2 K.B. 220, 221, 222: "It is not enough for the defendants to show that it was impossible for them to get the goods from the particular source they contemplated when entering into the contract. If they could have obtained the goods elsewhere which would have satisfied the contract they were bound to do so."

<sup>2</sup> (1943), 2 All E.R., at 583.

<sup>3</sup> [1942] 1 K.B. 397; *supra*, 30. See Note (1943), 6 Mod. L. Rev. 159.

Since 28th March, 1942, a *war-time lease* (as defined in Landlord and Tenant (Requisitioned Land) Act, 1942, s. 11) may be *disclaimed*.

<sup>4</sup> Section 2 (1) (a); *ib.*, at 370.

<sup>5</sup> [1942] 1 K.B., at 377.



"in the case of furnished premises *rent issues out of the land* just as in the case of unfurnished premises." The furniture was *not separately let*, but "merely as an incident of the tenancy." Nor was frustration (even if the doctrine were applicable) consistent with the facts: the requisition might be lifted: "the whole substratum of the contract had not gone."<sup>1</sup>

"In English law," said Birkett, J.:

"the fact that a lessee had been deprived of the possession of the premises is no excuse for non-payment of rent in the absence of express exception, and the contractual position between the landlord and tenant is in the main unaffected."<sup>2</sup>

The agreement in fact came into being and the tenant had entered and paid rent. In principle there was no distinction between furnished and unfurnished premises—apart from the rule that "in the letting of furnished premises there is an implied term that the premises are fit for human habitation at the date of the letting."<sup>3</sup> The rent of furnished premises issues out of the land, not out of the goods.<sup>4</sup> Where land and goods are let at an entire rent and the tenant is evicted, no apportionment can be made for the goods.<sup>5</sup> Further, the fact that the duration of the agreement was "necessarily indeterminate and uncertain" did not prevent the rule applicable to a demise for a term of years from applying. To this agreement frustration had no application.<sup>6</sup> If, however, frustration did apply, the contract was at an end.<sup>7</sup>

## 6. MINING LEASE

Where a tin-mining sub-lease of land situate in Johore was granted in 1932 for twenty-one years, the occupation by the

<sup>1</sup> *Ib.*, at 378. See also Birkett, J.'s summary of the arguments (at 360, 381).

<sup>2</sup> *Ib.*, at 379, contrasting Scots law in *Tay Salmon Fisheries Co., Ltd. v. Speddie* [1929] S.C. 593, *infra*, 582. See also *Mackay v. Boyd* [1942] S.C. 56.

<sup>3</sup> [1942] 1 K.B. at 383, citing *Sarson v. Roberts* [1895] 2 Q.B. 395, 396, 397.

<sup>4</sup> *Ib.*, at 383, citing *Neuman v. Anderson*, 2 B. & R. (N.R.), 224, 226, 227, *per* Sir James Mansfield, C.J., where there had been a distraint for rent of furnished lodgings. "But it must occur constantly that the value of demised premises is increased by the goods upon the premises, yet the rent reserved still continues to issue out of the house or land, and not out of the goods, for rent cannot issue out of goods" (at 227).

<sup>5</sup> *Ib.*, citing *Emmett v. Colv*, 10 Eliz. 255, 256. "For the matter in law, there shall be no apportionment for the rent issueth out of the land, and follows it": *Williams v. Hayward* (1859), 1 E. & E. 1040 and 1051, *per* Lord Campbell, C.J.

<sup>6</sup> [1942] 1 K.B. at 584, citing *London & Northern Estates Co. v. Schlesinger* [1916] 1 K.B. 20, 24, *per* Lush, J., referring to "a term of years" as created by the agreement and vested in the tenant," *supra* *Whitehall Court, Ltd. v. Ethelinger* [1920] 1 K.B. 680, 686, *per* Eal of Reading, C.J., where the block of flats had been requisitioned, *Matthey v. Curling* [1922] 2 A.C. 180, 237, *per* Lord Atkinson, *supra*.

<sup>7</sup> [1942] 1 K.B. at 387. The judgment should be read in the light of the opinions in *The Cricklewood Case*, (1945), 61 T.L.R. 202; *infra*, 574.

Japanese armed forces in January, 1942, did not "frustrate the contractual relation": *The Pelepah Case*.<sup>1</sup>

In 1942 the sub-lease had eleven years to run and there was (in effect) a right to call for a further twenty-one years. By 1942 the sub-lessees would have paid a considerable part of the purchase price or premium. The present action had been brought for the balance of an annual instalment of £5,000, payable in 1942, of the sum of £27,829, agreed between the parties in 1941, as due. The parties, said Tucker, J., would not, in or about 1930, "inevitably have agreed that if in January, 1942, the events which have actually taken place, should supervene, the contract should forthwith be put an end to for all purposes."<sup>2</sup> The defendants might have elected to take their chance of the Japanese being evicted within a reasonable time, so as to reap the benefit of what they had spent, during the remainder of the thirty-two years.

"I cannot say that both parties would, as a matter of course, have agreed that the contract should be frustrated. A mining lease of this kind with several years to run and a reasonable prospect of renewal bears little resemblance to the usual commercial contract for the delivery of commodities or machinery to which the doctrine of frustration has so often been applied."<sup>3</sup>

An implied term—"I think, now generally accepted as the proper test"—the court declined to read into the contract.<sup>4</sup>

It was further contended that a mining lease differed from an ordinary lease or from a building lease: it was "no more than a contract for the sale of minerals coupled with a right to the purchaser to go on and under the land to obtain what he has bought."<sup>5</sup> In Johore, it was said, the tenant has "usufructuary rights," not an "estate in land." Tucker, J., found that the forms and the language used in leases in Johore closely resemble those of English leases, and that, for all practical purposes, the results were the same. Frustration did not apply to a mining lease any more than to any other lease: in the absence of evidence to the contrary, the law of Johore upon frustration must be presumed to be the same as English law.

This decision accords with the *Cricklewood* decision: on the facts the contract was not frustrated. The dicta, however, must be read in the light of that case. It is submitted that the

<sup>1</sup> *Pelepah Valley (Johore) Rubber Estates, Ltd. v. Sungri Besi Mines, Ltd.* (1944) 170 L.T. 338. Heard in March, 1944, before *The Cricklewood Case* (1945), 61 T.L.R. 202; *infra*, 568.

<sup>2</sup> *Ib.*, at 339.

<sup>3</sup> *Ib.*, 339, 340.

<sup>4</sup> *Ib.*, 340.

<sup>5</sup> *Ib.*, citing from the speech of Lord Cairns in *Gowan v. Christie* (1873), L.R. 2 Sc. & Div. App. 273: "What we call a mineral lease is really, when properly considered, a sale out and out of a portion of land."

criterion whether "as a matter of course the parties would have agreed that the contract should be frustrated" is incorrect.<sup>1</sup>

### 7. BUILDING LEASE

Where, under a building lease, made in 1936, plots of land were demised for ninety-nine years to lessees who covenanted to build shops within a specified time, although conditions resulting from the war had practically put an end to private building, *on the facts of that case* the obligation to pay rent had not been discharged by frustration: the lease itself contemplated that rent should be payable even though no building was going on: and had more than ninety years to run: *The Cricklewood Case*.<sup>2</sup>

#### (i) *Before Asquith, J.*

Plot A consisted of ten shop sites; the rent of each was to be one peppercorn for the first year, and £35 afterwards. Plot B consisted of sites for fourteen shops; the rent of each, one peppercorn until one year from the notification that consent to build had been received, and £35 afterwards. Before the war, ten shops had been built on plot A. On plot B only four of the fourteen had been built. The duty to build on the other ten sites did not arise until the war had begun. The plaintiffs claimed rent for the fourteen sites. The defendants said that all obligations under the lease had been discharged by frustration.

It was contended that this was not a "lease" so as to prevent the doctrine of frustration from applying: it was a "commercial adventure or speculation, an ordinary commercial contract, and as such it is capable of frustration."<sup>3</sup> There was an obligation to build houses worth £1,500 each. "The demise was a mere incident in the commercial adventure. The real object of the contract was the building of houses on the land."<sup>4</sup> The dissenting dictum of Atkin, L.J., in *Matthey v. Curling* was cited: since a lease normally gives the lessor an option to determine on a certain event, there was "no logical absurdity in implying a term that it shall be determined absolutely on the happening of other events, namely, those which in an ordinary contract work a frustration."<sup>5</sup>

The lessors were developing a building estate and the tenants were proposing to build "a shopping centre." An appeal to

<sup>1</sup> See per Atkin, L.J., in *The Russkoe Case*; *supra*, 416; *infra*, 606.

<sup>2</sup> *Cricklewood Property & Investment Trust, Ltd., and Others v. Leighton's Investment Trust, Ltd.* (1945), 61 T.L.R. 202, affirming *Leighton's Investment Trust, Ltd. v. Cricklewood Property & Investment Trust, Ltd.* [1943] 1 K.B. 493. (See *Note* (1945), 61 L.Q.R. 111-113.)

<sup>3</sup> *Ib.*, at 494. This argument was also suggested at 57 L.Q.R. 342, *Note* 15.

<sup>4</sup> (1942), 59 T.L.R. 27, 28.

<sup>5</sup> [1922] 2 A.C. 180, 200. Reference was also made to *Innholders Company v. Wainwright* (1917), 33 T.L.R. 356, 357, where Ridley, J., held that during the prohibition against building, the contract was *suspended*.

the Minister of Town and Country Planning had been compromised: not more than twenty-four shops should be built on these two parcels: eight might be built at once—not later than March, 1937, and not less than four to each 200 houses occupied—within one year from the notification that building might proceed—until the twenty-four were built. An “abeyance period” would postpone the duty to build—but would not affect the rent payable. Although no buildings might be erected, the full rent became and remained payable for the sites a year after notification. A right of re-entry for non-payment of rent was reserved, exercisable upon a particular shop only, once it had been assigned or underlet: each shop was to be held separately and independently. The tenants had the option to buy the freehold and had bought the freehold of the *red* sites. In 1938 the original lessors conveyed the land to *Leightons Trust*. The *Cricklewood Trust* having paid no rent since the outbreak of war, *Leightons*, by specially endorsed writ, sued them, and two guarantors, claiming arrears (agreed at £419) accrued due since September, 1939.<sup>1</sup>

*Leightons* asked for summary judgment, and by their affidavit, in reply, *Cricklewood Trust* deposed that by the outbreak of war demand for the shops had ceased and finance had become obtainable, and that restrictions placed by the Government upon building and the obtaining of materials made it impossible to build; the agreement had been frustrated.<sup>2</sup> The master gave leave to defend. On appeal to the judge in chambers, *Leightons* admitted these facts; the admission was embodied in the order: short cause, affidavit to be treated as pleading, no further defence.<sup>3</sup>

The case had proceeded throughout, said Viscount Simon, L.C., on the footing that building was, and continued to be, impossible: no orders, however, under the Defence (General) Regulations had been set out or referred to; it would have been more satisfactory if this had been done.<sup>3</sup>

Asquith, J., said that frustration had no application to an ordinary lease or to the lease of a furnished house.

“A contract may be frustrated, but a demise is more than a contract. It is a conveyance of an estate in land or a chattel real. It transfers proprietary as well as personal rights. This seems to me just as true of a building lease as of any other kind of lease.”<sup>4</sup>

<sup>1</sup> These facts are taken from the speech of Viscount Simon, L.C. (1945), 61 T.L.R. 202, 203.

<sup>2</sup> Set out in speech of Lord Wright (1945), 1 All E.R. 252, 259, 260.

<sup>3</sup> (1945), 61 T.L.R., at 203. “Unfortunately we have no pleadings and little evidence, owing to what seems to me a regrettable attempt to take a short cut in an important case”: *per* Lord Russell of Killowen, at 204.

<sup>4</sup> [1943] 1 K.B., at 495.

It had been argued that the building scheme was "a broad commercial undertaking capable of frustration and that the building lease was a mere pendant or adjunct of that larger venture":

"The fact remains that the instrument . . . is a lease, whatever its ulterior or broader objects; that, as such, the vested rights of property did not merely create a contractual right; and that . . . such an instrument is not affected by the doctrine of frustration."<sup>1</sup>

*If, however, the doctrine did apply, on the facts he would hold that the contract had been discharged.*<sup>2</sup>

### (ii) *In Court of Appeal*

The Court of Appeal dismissed the appeal.<sup>2</sup> MacKinnon, L.J., delivering the short judgment of the court, said:—

"The doctrine of frustration . . . has been applied to a variety of contracts, but it has never been applied to a demise of real property. Indeed, there is clear authority that it cannot be so applied . . . We do not think it necessary to examine the question further. It is impossible for the defendants to rely on the doctrine of frustration to relieve them from their obligation as tenants under a demise of land for ninety-nine years."<sup>3</sup>

Leave to appeal to the House of Lords was refused.

### (iii) *In House of Lords*

#### (a) *The Argument*

The Appeal Committee of the House of Lords, Lord Atkin presiding, in particular reliance upon the dictum of Atkin, L.J., in *Matthey v. Curling*,<sup>4</sup> granted leave to appeal to the House.<sup>5</sup>

The case for the appellants submitted that there was no reason why the doctrine of frustration should not apply to a building lease and that, the lease, or, alternatively, the duties to build and to pay rent, were dissolved, or alternatively, excused or suspended. The views of the courts below were erroneous on four grounds: (i) the dictum of Atkin, L.J., in *Matthey v. Curling*<sup>4</sup>;

"it does not appear to me conclusive against the application to a lease of the doctrine of frustration that the lease, in addition to containing contractual terms, grants a term of

<sup>1</sup> [1943] 1 K.B., at 495.

<sup>2</sup> *Ib.*, 496 (Scott, MacKinnon and du Parc, L.J.J.).

<sup>3</sup> *Ib.* See also *Westminster (Duke) v. Howard* (1941), 85 Sol. J. 106. Where H was a tenant at will, no building lease having yet been granted, and the land had been requisitioned and building prohibited, Hallett, J., held that no frustrating event had occurred and that the doctrine of frustration would not avail the defendant.

<sup>4</sup> [1922] 2 A.C. 180, 199, 200.

<sup>5</sup> Lord Atkin died a few months before the hearing. Mr. A. T. Denning, K.C. (as he then was), settled the written case. By the courtesy of the appellants' solicitors, the author was able to study the documents placed before the House.

years. Seeing that the instrument as a rule expressly provides for the lease being determined, at the option of the lessor, upon the happening of certain specified events, I see no logical absurdity in implying a term that it shall be determined absolutely on the happening of other events—namely, those which in an ordinary contract work a frustration.”

(ii) the House did not in that case decide that frustration could never apply to a lease. It held that requisitioning was no answer to a claim for rent, the tenant's remedy being against the Government for compensation; (iii) in *Taylor v. Caldwell*<sup>1</sup>—the question arising whether the hall was demised or not—Blackburn, J., said: “Nothing, however, in our opinion, depends on this”; (iv) in Scotland, frustration has been applied to a lease.<sup>2</sup>

The case for the respondents submitted that—(i) the doctrine of frustration does not apply to a demise; (ii) no such implication should be made in a contract for ninety-nine years; (iii) the *Schlesinger*<sup>3</sup> and *Whitehall*<sup>4</sup> cases were rightly decided; (iv) temporary difficulty in building or letting could not frustrate a demise of the land; (v) on the facts there was no frustration of the lease.

The appellants argued that the House was not bound either by principle or authority to hold that a lease cannot be frustrated. Here—looking at the arrangement as a whole<sup>5</sup>—the lease had no meaning except on the basis that it would be possible and lawful to build shops; the period of building was expected to be twelve months after notice. It was a lease to carry out a building venture; if, within seven years, no notification of consent had been given, the lease should be determined as to one or more of the sixteen sites.

The respondents argued that to this lease frustration could not apply: the general question was not material. Rent was payable for each site; rent issues out of the land, and was payable whether a shop were erected or not. The parties contemplated the only circumstances under which the lease could be determined, viz., if notification of consent were not given within seven years. A lease was not a mere contract; a term of years absolute was an estate in land.<sup>6</sup>

<sup>1</sup> (1863), 3 B. & S. 826, 832.

<sup>2</sup> *Infra*, 582–585: *Duff v. Fleming*, 8 Macph. 769; *Tay v. Speedie* [1929] S.C. 593; *Mackeson v. Boyd* [1942] S.C. 56.

<sup>3</sup> *London and Northern Estates Company v. Schlesinger* [1916] 1 K.B. 20, 24, per Lush, J.; *supra*, 541.

<sup>4</sup> *Whitehall Court, Ltd. v. Ettlinger* [1920] 1 K.B. 680, 686, 687, per Lord Reading, C.J.; *supra*, 541.

<sup>5</sup> See *The Denny Mott Case* [1944] A.C. 265, 282, per Lord Porter.

<sup>6</sup> Law of Property Act, 1925, s. 205 (1) (xxvii).

In reply the appellants submitted that this was a *joint* adventure: the parties were *mutually* interested. To the landlords in their development of a building estate the building lease was of interest: shopping facilities were essential. Upon forfeiture, a covenant to pay rent would end; why not, upon frustration? Blackburn, J.'s judgment in *Taylor v. Caldwell*<sup>1</sup> was the judgment of the court. He meant what he said: whether there was a licence or a demise of the hall, the case would be the same.<sup>2</sup>

(b) *On the Facts, no Frustration*

The appeal raised two questions, said Viscount Simon, L.C., *first, could* frustration apply to determine a lease; *secondly, if it could, was this lease* determined by frustration?<sup>3</sup>

Even if a lease could, in law, be determined by frustration, *this lease*, the House agreed, *on the facts*, was not so determined.<sup>4</sup> The lease had more than ninety years to run; the length of the interruption caused by the present war and the emergency regulations "is presumably a small fraction of the whole concern." Frustration does not suspend, but "brings the whole arrangement to an inevitable end forthwith."<sup>5</sup> Here, the lease itself contemplated that rent be payable, even though no building proceeded: the interruption did not "destroy the identity of the arrangement or make it unreasonable to carry out the lease according to its terms as soon as the interruption in building is over."<sup>6</sup>

Thus, also, Lord Russell of Killowen. "For a portion of a span of ninety-nine years" the erection of shops had been postponed, and rent remained payable. "But that is to carry out the very provisions of the lease which is said to be frustrated."<sup>7</sup>

The rent is payable for *sites*, not for shops; the lease provided in terms that the rent and the time and manner of payment were to remain unaffected: "the intention of the parties was that rent would be payable even though the sites were vacant and that the landlord was not to be driven to sue for damages for breach of covenant to erect shops. To such an action the war-time restrictions might well afford

<sup>1</sup> (1863), 3 B. & S. 820, 830.

<sup>2</sup> Lord Goddard referred to a case decided by the Court of Appeal of which he was a member. The court had held that frustration did not apply to a building lease: *Perfect Homes, Ltd. v. M. Howard (Mitcham), Ltd.*, in which the judgment of Hallett, J., was affirmed by Scott, MacKinnon and Goddard, L.JJ. ((1942), 5th March; 16th September).

<sup>3</sup> (1945), 61 T.L.R., at 203.

<sup>4</sup> *Ib.*, at 203.

<sup>5</sup> *Ib.*, at 204.

<sup>6</sup> The test in *Metropolitan Water Board Case* [1918] A.C. 119, 128; *supra*, 493.

<sup>7</sup> (1945), 61 T.L.R., at 204, 205.

a defence, but that is a consequence very different and far removed from frustration."<sup>1</sup>

No circumstances, said Lord Wright, were shown which would excuse the payment of rent. The case was concluded by *Matthey v. Curling*<sup>2</sup> where the facts were stronger. Here was no ejection, no interference with the enjoyment of land. For an uncertain time—"likely to be short compared with the ninety-nine years of the lease"—the builders could not build. The covenants to pay rent were absolute and "expressly made independent of the progress of the building operations." The interruption "cannot be regarded as likely to be so long . . . as to destroy the basis or foundation of the lease and to lead the court to declare that it is dissolved . . ."<sup>3</sup>

The "exact question," said Lord Porter, is not: "does the doctrine of frustration apply to leases generally, but in the circumstances has this lease been frustrated."<sup>4</sup> The present lease had not been frustrated because the tenants, under present circumstances, were unable to use the land for the contemplated purpose—the building of shops. The land is there; payment of rent is not prohibited. Some terms of the tenancy may, for the time being, be impossible to perform: building may not be feasible, but the tenancy is "not thereby necessarily determined." The lease is long, the interruption "comparatively short." The duty to pay rent does not depend either upon ability to erect shops, or upon the erection of shops. Rent is payable from one year after notification of consent to build. The "abeyance clause" excusing *immediate building*, does not excuse *rent* during the period of abeyance. No reason arose for invoking frustration—if (which point he reserved), frustration could apply—

"The basis of the contract is not gone and if the theory of an implied term be relied upon, I cannot think that a lessor, however reasonable, must be considered to have contracted upon the basis that the tenancy would come to an end in case the building of shops became impossible for a number of years."<sup>5</sup>

It was impossible to say, declared Lord Goddard, that if the doctrine did apply to a lease, a lease for ninety-nine years had been frustrated because orders made under defence regulations restricted building during the war or the "present emergency." Even if the restrictions continued for ten years, "that is a very small part of the life of this lease." The rent is reserved for sites, not shops, and begins twelve months after notice that building may proceed—even though no building does proceed. If, however, the tenants were bound to build but, by reason of

<sup>1</sup> (1945), 61 T.L.R., at 205.

<sup>2</sup> [1922] 2 A.C. 180.

<sup>3</sup> *Ib.*, at 206.

<sup>4</sup> *Ib.*, at 207.

<sup>5</sup> *Ib.*, at 207.



government restrictions, could not do so, that would be a good defence to an action for breach of covenant, but not to a claim for rent.<sup>1</sup>

(c) *Can Frustration apply to a Lease?*

Whether frustration could determine a lease did not therefore arise, but the general principle was discussed, and a strong and clear conflict of opinion became manifest.

Viscount Simon, L.C., saw no reason why, in principle, a lease should not be terminated by frustration; no authority to the contrary bound the House.<sup>2</sup> "Frustration," said Lord Wright, is "modern and flexible and is not subject to being constricted by an arbitrary formula."<sup>3</sup>

On the other side, Lord Russell of Killowen knew of no power in the court to order a tenant to surrender his lease and no power to declare a lease to be at an end except upon the happening of an event which the lease provided would bring it to an end.<sup>4</sup> Lord Goddard thought that as long as the interest in the demised premises remained in the tenant there could be no frustration.<sup>5</sup>

Lord Porter reserved the point until it should arise.<sup>6</sup>

(d) *Viscount Simon, L.C. : "Theoretic Possibility"*

Viscount Simon, L.C., formulated the first comprehensive definition of frustration.<sup>7</sup> A lease creates in the lessee an estate, a chattel interest lasting for a stipulated term,<sup>8</sup> which may determine sooner, e.g. (as in this case), for non-payment of rent or for breach of covenant. Can a lease, pre-determinable under express provisions, predetermine from a supervening cause amounting to frustration?<sup>9</sup> The term would end, rent would cease, the lessor would recover the property at once. To say that this cannot be so because a lease is an estate—*more than a contract*—seems almost to argue in a circle: it assumes that frustration can only arise "in cases where there is a contract and nothing else."<sup>10</sup> Difficult, indeed, it is to imagine an event prematurely determining by frustration a lease for years at a rent *under which the tenant may use the land as he pleases*. But suppose "some vast convulsion of nature swallowed up the property altogether, or buried it in the depths of the sea." "The site" might cease to exist.<sup>11</sup> If the lease were for a particular purpose and, for that purpose, the lessee was bound to use the land, frustration may well arise:

"Suppose, for example, that legislation were subsequently passed which permanently prohibited private building in the

<sup>1</sup> (1945), 61 T.L.R., at 208.

<sup>2</sup> *Ib.*, at 203, 204.

<sup>3</sup> *Ib.*, at 207.

<sup>4</sup> *Ib.*, at 205.

<sup>5</sup> *Ib.*, at 208.

<sup>6</sup> *Ib.*, at 207.

<sup>7</sup> *Supra*, 405.

<sup>8</sup> Law of Property Act, 1925, s. 1 (1) (b).

<sup>9</sup> (1945), 61 T.L.R., at 203.

<sup>10</sup> *Ib.*, at 203.

<sup>11</sup> *Ib.*, at 204.

area, or dedicated it as an open space for ever, why should this not bring to an end the currency of a building lease the object of which is to provide for the erection on the area, for the combined advantage of the lessee and lessor, of buildings which it would now be unlawful to construct?"<sup>1</sup>

That the Legislature would provide for compensation is irrelevant to test applicability of the doctrine. Nor is it relevant in determining whether the doctrine applies to consider possible hardship in some cases between the parties. Hardship there was until *The Fibrosa Case*,<sup>2</sup> and even then, a statute<sup>3</sup> was considered necessary.

No authority binds the House that a lease cannot, in any circumstances, be ended by frustration.<sup>4</sup> *Matthey v. Curling*<sup>5</sup> decided that requisitioning was no answer to a claim for rent: the tenant's remedy was to claim compensation from the Government. The tenant remained liable to deliver up the premises in proper condition although, while under requisition, they were destroyed by fire and the tenant could have insured. A passage in Atkin, L.J.'s dissenting judgment, said Viscount Simon, L.C., "exactly expressed" his view: since a lease usually provides that a lease may, at the lessor's option, be determined, "I see no logical absurdity"—Atkin, L.J., had observed—"in implying a term that it shall be determined absolutely on the happening of other events—namely, those which in an ordinary contract work a frustration." In *Taylor v. Caldwell*,<sup>6</sup> when the question was raised whether the hall was demised or not, Blackburn, J., said: "Nothing, however, in our opinion, turns on this." In *The Whitehall Case*,<sup>7</sup> Lord Reading, C.J.'s "primary decision" was that the tenant's inability to reside in the flat did not affect his chattel interest. Lord Reading had adopted Lush, J.'s dictum in *The Schlesinger Case*,<sup>8</sup> but to the decision in that case also, the dictum was *obiter*. In any event, he did not say that a lease could never be determined by a frustrating cause. By that proposition the House was not bound, but the occasions on which frustration might terminate a lease must be "exceedingly rare."<sup>9</sup>

<sup>1</sup> (1945), 61 T.L.R., at 204.

<sup>2</sup> [1943] A.C. 32, Chap. XXIV; *infra*, 627.

<sup>3</sup> The Law Reform (Frustrated Contracts) Act, 1943, Chap. XXVII, *infra*, 681.

<sup>4</sup> (1945), 61 T.L.R., at 204.

<sup>5</sup> [1922] 2 A.C. 180. See (1945), 61 T.L.R., at 204.

<sup>6</sup> (1863), 3 B. & S. 826, 832. See (1945), 61 T.L.R., at 204.

<sup>7</sup> *Whitehall Court, Ltd. v. Ettlinger* [1920] 1 K.B. 680. See (1945), 61 T.L.R., at 204.

<sup>8</sup> *London and Northern Estates Co. v. Schlesinger* [1916] 1 K.B. 20, 24. See (1945), 61 T.L.R. 204.

<sup>9</sup> *Ib.*, at 204.

(e) *Lord Russell of Killowen : no Frustration of Estate in Land*

To Lord Russell of Killowen frustration is a doctrine applicable only to the determination of a contract. "A lease is much more than a contract. It creates and vests in the lessee an estate or interest in the land, a chattel interest, it is true, but a vested estate or interest none the less."<sup>1</sup> The dictum of Lush, J., in *Schlesinger's Case*<sup>2</sup> was approved in *The Whitehall Case*,<sup>3</sup> itself approved by Lord Atkinson in *Matthey v. Curling*.<sup>4</sup>

Frustration arises because the contractual "*venture*" can no longer be carried out: "The court in such circumstances declares the contract to be, or treats it as being, no longer binding on the parties. That is an end of the matter."<sup>5</sup> When a lease is in question, the *lease* is the "*venture*"; the contractual obligations are merely incidental to the relationship of landlord and tenant created by the demise and vary with the lease. Circumstances may arise making it difficult or even impossible for one party to carry out his obligations; the lease remains: "the estate in the land would still be vested in the tenant."

"I know of no power in the court to declare a lease to be at an end except upon findings that some event has occurred upon the happening of which the lease terminates by reason of some express provision contained in the document. In such a case the term ends not because the court exercises a power to terminate it, but because in the events which have happened the lease operated only as a demise for the shorter period. Nor do I know of any power in the court to order a tenant (who, be it observed, might have sublet part by way of mortgage or otherwise) to surrender his term to the landlord. The lease must of necessity continue."<sup>6</sup>

Lord Russell disagreed with Lord Wright's view that "if the contract is avoided or dissolved the estate in land falls with it":

"A lease may come to an end, and with it the estate in the land and all contractual liability by virtue of some provision in the lease, or by reason of some defect in the title of the person who purported to grant it. But, in my opinion, the cesser or suspension of some contractual liability under the lease will not destroy the estate in land which is vested in the lessee unless the lease provides that in that event the term of years shall cease."<sup>7</sup>

(f) *Lord Wright : Frustration, "Not constricted by Arbitrary Formula"*

Lord Wright admits that a lease is more than a contract: "it creates an estate in land"—which, however, is governed by

<sup>1</sup> (1945), 61 T.L.R., at 205.

<sup>2</sup> [1916] 1 K.B. 20.

<sup>3</sup> [1920] 1 K.B. 680.

<sup>4</sup> [1922] 2 A.C. 180, 237.

<sup>5</sup> (1945), 61 T.L.R., at 205. See *per Russell, J.*

(as he then was), in *The Badische Case* [1921] 2 Ch. 331, 379, 382, 383; *supra*, 502.

<sup>6</sup> (1945), 61 T.L.R., at 205.

<sup>7</sup> *Ib.*, at 205.

the contract between the parties.<sup>1</sup> The claim in *Paradine v. Jane* was in debt; tenure is not mentioned.<sup>2</sup> "The absolute character of the contract" as there stated is not the modern law:

"... so unqualified a statement would not be consistent with the modern law relative to the discharge of contractual obligations by impossibility of performance,"<sup>3</sup> as explained in *The Constantine Case*<sup>4</sup> and "other well-known authorities."<sup>5</sup>

Referring to Lord Sumner's "pithy description of the doctrine" in *The Hirji Mulji Case*,<sup>6</sup> Lord Wright continues:—

"But the doctrine of frustration can only be held to be applicable after a careful consideration of the particular case, and in particular after scrutinising the nature of the contract and the particular circumstances of the case."<sup>7</sup>

Lease involves tenure as well as contract and has become the subject of precise rules. The majority in *Matthey v. Curling*<sup>8</sup> said nothing about *The Whitehall Case*<sup>9</sup>; only Lord Atkinson observed that it was "rightly decided."<sup>10</sup> Lord Reading's language in that case did not justify the head-note that frustration could not apply to a lease. That case decided that, *on the facts*, requisition did not amount to eviction by title paramount and did not determine the tenancy. Sufficient for *Schlesinger's Case*<sup>10</sup> was it to hold that although the tenant, because an alien enemy, was prohibited from residing in the area, he could assign or sub-let his flat; performance of the contract had not become impossible. The observation of Lush, J., that the tenancy was not a mere contract, but a contract which created a term of years, was *obiter*. This, indeed, is an "*element*" in considering whether supervening events—e.g., requisition or destruction—have ended the lease or the tenant's obligations.

"... as a general rule this result does not follow casualties of that character, even though the tenant is deprived of the advantages at least for a time which the parties to the lease contemplated he would normally enjoy. . . . a temporary interruption of the tenant's use and occupation does not affect the covenants or the chattel interest."<sup>11</sup>

<sup>1</sup> (1945), 61 T.L.R., at 206.

<sup>2</sup> (1647), Aleyn 26; *supra*, 458.

<sup>3</sup> (1945), 61 T.L.R., at 206.

<sup>4</sup> [1942] A.C. 154.

<sup>5</sup> See also *The Kronprinzessin Cecilie* (1916), 244 U.S. 12, 22, *per* Holmes, J.: "The seeming absolute confinement to the words of an express contract indicated by the older cases like *Paradine v. Jane* (1647), Aleyn 26, has been mitigated so as to exclude from the risks of contracts for conduct (other than the transfer of fungibles like money), some, at least, which, if they had been dealt with, it cannot be believed that the contractee would have demanded or the contractor would have assumed."

<sup>6</sup> [1926] A.C. 497, 510.

<sup>7</sup> (1945), 61 T.L.R., at 206.

<sup>8</sup> [1922] 2 A.C. 180, 237; *supra*, 552.

<sup>9</sup> [1920] 1 K.B. 680; *supra*, 541.

<sup>10</sup> [1916] 1 K.B. 20; *supra*, 541.

<sup>11</sup> (1945), 61 T.L.R., at 206.

The Scots rule which differs affords no analogy: the legal background is different.<sup>1</sup>

Since *Paradine v. Jane*,<sup>2</sup> the tenant's covenant to pay rent or repair or deliver up in repair is, in general, unaffected by casualties interfering with his enjoyment of the land.<sup>3</sup> Though the house be burnt, he must repair.<sup>4</sup> A covenant in a mining lease to raise and pay for a certain amount of coal binds, even though the mine be exhausted of coal.<sup>5</sup> The lessee's covenants are "generally absolute. The enjoyment and the covenant do not generally march together."<sup>6</sup> On this basis—not on the fact that the lease creates an estate in land—Lord Buckmaster's opinion proceeds in *Matthey v. Curling*<sup>7</sup>: and Lords Sumner, Wrenbury and Carson concurred.

On the other hand, even in the absence of express terms, covenants in a lease may, by operation of law, be suspended or terminated. A covenant to pay rent is suspended if the lessor evicts the tenant or if there be eviction by title paramount.<sup>7</sup> If the lessee, by matter of record, disclaims the lessor's title, a lease may be forfeited.<sup>8</sup> These results do not depend upon the fact that lease involves tenure and creates an estate in the land: they "flow from the general nature of the contract as understood in English law and its application to particular conditions of fact."<sup>9</sup>

"If the contract is avoided or dissolved, as it may be by either party, under the express terms of the lease, the estate in land falls with it. I do not see why this may not be also true if the lease were dissolved by operation of law."<sup>9</sup>

Hannen, J.'s judgment in *Baily v. De Crespigny*,<sup>10</sup> with the observation that if the *lessee* had been sued for breach of covenant, he would equally have been discharged, "comes very near to the idea of frustration at least if the performance of the covenant is fundamental to the lease . . ." Lord Buckmaster never suggested that frustration could not be applied to a lease. True: it could be applied "only in rare and exceptional cases."

<sup>1</sup> (1945), 61 T.L.R., at 206; see *Tay v. Speedie* [1929] S.C. 593; *Mackeson v. Boyd* [1942] S.C. 56; *infra*, 582.

<sup>2</sup> (1647), Ayleyn 26; *supra*, 458.

<sup>3</sup> (1945), 61 T.L.R., at 206. And see *Izon v. Gorton* (1839), 5 Bing. (n.s.) 501.

<sup>4</sup> *Ib.*, at 206, citing *Monk v. Cooper* (1727), 2 Stra. 763; *Lofft v. Dennis* (1859), 1 E. & E. 474; *Hart v. Rogers* [1916] 1 K.B. 646.

<sup>5</sup> *Ib.*, at 206, citing *Bute v. Thompson* (1844), 13 M. & W. 487.

<sup>6</sup> *Ib.*, at 206.

<sup>7</sup> [1922] 2 A.C. 180, 227, 230.

<sup>8</sup> *Doe v. Groves & Webb* (1839), 10 Ad. & El. 427.

<sup>9</sup> (1945), 61 T.L.R., at 207.

<sup>10</sup> (1869), L.R. 4 Q.B. 180.

"But the doctrine of frustration is modern and flexible and is not subject to being constricted by an arbitrary formula. I am not therefore prepared to state as a universal principle that it can in no circumstances be applied to a lease."<sup>1</sup>

Lord Wright suggests the case of a building lease for ninety-nine years and the prohibition (soon after the execution of the lease), of building, by a public body acting under statutory authority, for an indefinite time the end of which could not be foreseen.

"In effect that would be a prohibition, total for all practical purposes both in extent and time, which would override and control both lessor and lessee. Would the lessee, in that event, continue bound to pay under the lease the yearly rent for ninety-nine years, or would the relationship of landlord and tenant be dissolved by operation of law in respect of that site? As a matter of general principle, I would say that the lease was avoided and the term came to an end."<sup>2</sup>

(g) *Lord Porter : The Point Reserved*

Lord Porter pointed out that the cases in which a lease could be frustrated were, it was conceded, "rare and exceptional." A lease is more than a contract: it creates an estate in land. The rent is payable for the site and issues out of the land. To visualise a case to which frustration could apply is not easy. The land is there; the basis of the tenancy exists. But "exceptional circumstances might conceivably arise" and, until it was necessary to decide, Lord Porter preferred to reserve the point.<sup>3</sup>

(h) *Lord Goddard : Frustration might cause Injustice*

Lord Goddard agreed with Lord Russell of Killowen. The House, in *Matthey v. Curling*<sup>4</sup> had accepted Lush, J.'s reasoning in *Schlesinger's Case*.<sup>5</sup> Lord Atkinson approved the decision in the *Whitehall Case*,<sup>6</sup> and neither Lord Sumner nor Lord Carson expressed dissent. Whatever be the true grounds of frustration, "it applies only where the foundation of the contract is discharged so that performance or further performance is no longer possible."

In the case of a lease the foundation of the agreement, . . . is that the landlord parts for a term of years with his interest in the demised property which thereupon becomes vested in the tenant in return for a rent. So long as the interest remains in the tenant there is no frustration though particular use may be prevented."<sup>7</sup>

<sup>1</sup> (1945), 61 T.L.R., at 207.

<sup>2</sup> *Ib.*, at 207.

<sup>3</sup> *Ib.*, at 207.

<sup>4</sup> [1922] 2 A.C. 180, 237; *supra*, 552.

<sup>5</sup> [1916] 1 K.B. 20; *supra*, 541.

<sup>6</sup> [1920] 1 K.B. 680.

<sup>7</sup> (1945), 61 T.L.R., at 208.

If frustration did apply to a lease, "some strange and unjust results would follow": the landlords could re-take the land *and any buildings thereon*, for which they would have to pay nothing; the tenants, though they wished to pay rent, would have no title. And what of sub-tenants or mortgagees?<sup>1</sup>

"... it is not the estate in the land which is affected, but the use to which it can be put."<sup>2</sup>

### (i) Conclusion

The reasoning in *The Cricklewood Case* makes one thing clear: as a matter of practice, frustration of a lease can rarely arise: a long unexpired period of the term negatives frustration.

Upon the general question this, in conclusion, may be said.

(a) The reference to "some strange and unjust results" does not, with respect, appear to be material: even though its effects may sometimes be harsh, frustration may supervene. The real objection is that frustration is a doctrine of *contract*, and that by a lease a *term of years* is vested in the tenant, which can be divested under its express terms only. But is this concept of a lease, sacrosanct? If, upon the occurrence of a frustrating cause, the court decides that a *contract, absolute in terms*, has been terminated, why may not the court come to the same decision about a *lease, absolute also in its terms*? True, surrender and forfeiture are the usual modes of divesting a lease, but, in the early cases similar objections were raised against the power of the court to declare a *contract* terminated in circumstances for which the contract had not expressly provided.

The change of judicial opinion in *The Cricklewood Case* is reminiscent of the change in *Donoghue v. Stevenson*.<sup>3</sup> It is respectfully submitted that Atkin, L.J.'s dissenting dictum in *Matthey v. Curling*<sup>3</sup> is right.

(b) The other side is well argued in a learned essay, in which most of the authorities are marshalled.<sup>4</sup> The learned author points out the "extremely unsatisfactory results" which would flow from the frustration of a lease for a substantial term: (a) *the lessee would retain the benefit of the term* and the lessor would be released from future liability under his contract; (b) *the lessee would not be liable for subsequent rent*; (c) *the lessee would be discharged from liability for any other obligations* due to be performed after the frustrating event, e.g., restrictive covenants; (d) *the lessor would similarly be released*, e.g., from liability to pay rates as occupier; (e) *the lessor could retain a*

<sup>1</sup> (1945), 61 T.L.R., at 208.

<sup>2</sup> [1932] A.C. 562. See Pollock (1929), 45 L.Q.R. 293.

<sup>3</sup> [1922] 2 A.C. 180, 199, 200.

<sup>4</sup> E. O. Walford, *Impossibility and Property Law* (1941), 57 L.Q.R. 339-372.

*premium* if paid, or, if payable by instalments, the accrued instalments.<sup>1</sup>

The lessor's position would be "quite unenviable. It is inconceivable that any lessor and lessee could be presumed to have made such an unreasonable arrangement."<sup>2</sup>

The court's "refusal" to apply frustration to a lease is not based, however, on these "peculiar results," for (until 1943), peculiar results might ensue from the frustration of commercial contracts. The explanation is that "persons acquiring leases or even yearly tenancies are regarded as purchasers *pro tanto* of estates or interests in land."<sup>3</sup> From the moment of exchange of contracts, a purchaser of such an estate must bear the risk because in equity the estate is his. If, *after signing the contract but before completion*, a house erected on the land sold is accidentally destroyed by fire, the purchaser must perform the contract without abatement of the price: *a fortiori*, the destruction, *after the commencement of the term*, of buildings on the land demised does not frustrate the lease.<sup>4</sup> "It would seem that, apart from cases of mistake as to identity of subject-matter or of parties, fraud, illegality of performance, and the application of recognised rules of construction, there is no escape for vendors and purchasers, lessors and lessees, mortgagors and mortgagees from absolute liability upon absolute covenants, whether under the doctrine of frustration or otherwise, as the decisions stand at present."<sup>5</sup>

The remedy is not to apply the doctrine of frustration to a lease,<sup>6</sup> but to insert for the protection of the tenant the appropriate "cesser or abatement of rent" clause.<sup>7</sup>

(c) In *Vulcan-Brown Petroleum, Ltd. v. Mercury Oils, Ltd.*<sup>8</sup>—a Canadian case—*Mercury Oils* had leased gas and oil rights in certain land to *Vulcan-Brown Petroleum*, who agreed to drill an oil well within a certain term and, within four months of completion, to begin to drill another well in the same land. If *Vulcan-Brown* failed to do so within the time fixed, they would be deemed to have abandoned the land, and *Mercury Oils* could re-enter. *Vulcan-Brown* duly drilled the first well and asked the Petroleum Board for a licence for the second well. A licence was refused; Alberta regulations made it illegal to drill another well on the demised land. *Vulcan-Brown* sued for a declaratory judgment that failure to drill the second well did not constitute

<sup>1</sup> (1941), 57 L.Q.R., at 343, 344.      <sup>2</sup> *Ib.*, at 345.

<sup>3</sup> *Ib.*, at 345, referring to Law of Property Act, 1925, s. 205 (1) (xxi). And see Williston, *Contracts*, s. 946, pointing out that a lease is a conveyance rather than a contract.

<sup>4</sup> *Ib.*, at 346.

<sup>5</sup> *Ib.*, at 360.

<sup>6</sup> *Ib.*, at 371.

<sup>7</sup> *Ib.*, at 346, 347.

<sup>8</sup> [1941] 3 W.W.R. 384; [1942] 1 W.W.R. 138 (Harvey, C.J.A., dissenting), cited from and discussed by Wilson E. Maclean in (1942), 20 Can. Bar Rev. 466-9.



automatic abandonment of the land and that drilling was suspended for causes beyond *Vulcan-Brown's* control. The court of first instance gave judgment for *Vulcan-Brown*. An appeal was dismissed by a majority, who held that there was a grant of a proprietary interest in land, which, unless the grant itself so provided, could not be divested. The doctrine of frustration did not apply.

(d) The essay referred to in (b) was written before the House of Lords—in the tetralogy of cases from 1942 to 1944—had considered the doctrine of frustration. The “peculiar results” that might ensue from frustration of a lease, are not, as the learned author admits, a sufficient explanation.<sup>1</sup> Moreover, that a lease is a conveyance is not decisive of the matter: *first*, the lease depends upon a contract, and *secondly*, the tendency of the courts is to widen, rather than restrict, the sphere in which frustration may operate.

#### 8. SCOTS LAW: EFFECT OF REQUISITION ON LEASE

Where, in 1926, a tenant entered into a lease of a furnished mansion house and grounds for nineteen years at a rent of £442, and in 1940, the house and some of the grounds of a rental value of £400 were requisitioned and the furniture (which was unrequisitioned) was stored in the mansion house by the military authorities, *by Scots law* there was a “constructive total destruction” of the subjects let and the tenant was entitled to abandon the lease: *Mackeson v. Boyd*.<sup>2</sup>

(a) *Lord Patrick*: “Constructive Total Eviction.”

Lord Patrick said that by the decision in *Tay Salmon Fisheries Co. v. Speedie*,<sup>3</sup> “if the executive takes possession of subjects leased, there is a breach of warrandice, and, if the eviction be total, the tenant is entitled to abandon his lease.”<sup>4</sup> The test whether an eviction is total or partial is the same in *eviction by action of the executive and eviction resulting from rei interitus*.<sup>5</sup> The tenant had been deprived of the greater part of the subjects let—essential for the purpose for which the premises were let: “a constructive total eviction” entitled the tenant to abandon the lease.<sup>5</sup>

<sup>1</sup> (1941), 57 L.Q.R., at 345.

<sup>2</sup> [1942] S.C. 56, following *Tay Salmon Fisheries Co. v. Speedie* [1929] S.C. 593. Lord Wright, in *The Cricklewood Case* (1945), 61 T.L.R., at 206, says: “But the Scottish authorities afford no analogy applicable to English law, because they proceed, it seems, on a different view of the contract and of the legal background.”

<sup>3</sup> [1929] S.C. 593.

<sup>4</sup> [1942] S.C., at 58.

<sup>5</sup> *Ib.*, at 59. Lord Patrick cited the test laid down by Lord Shand in *Allen v. Markland* (1882), 10 R. 383, 389.

*(b) Lord President Normand : Constructive Total Destruction*

The First Division upheld the opinion of Lord Patrick. Lord President Normand said that where a tenant is excluded from possession by action of the Government, he has no right of damages nor can he terminate his lease on the ground of eviction.

"But it is now well settled in our law that, when the subjects let are wholly destroyed, the tenant has at once the right to claim cancellation of the lease, or, which is the same thing, to abandon it. I do not doubt that the landlord has a corresponding right, although in the usual case it is the tenant who has the interest to abandon."<sup>1</sup>

In the *Tay Salmon Fisheries Case*,<sup>2</sup> the salmon fishings remained as they were before the danger zone was created by the Air Council, but no one was allowed to fish: "in a practical sense" they were "wholly destroyed." There was no "actual destruction" but "constructive total destruction."<sup>3</sup>

*(c) Destruction, though temporary, dissolves contract*

It had been argued for the landlord that this case was *distinguishable* on three grounds: *First*, requisition had not made the subjects let "wholly unoccupiable"; *secondly*, the duration of the requisition was uncertain; and *thirdly*, the Compensation (Defence) Act, 1939, provided for compensation to the dispossessed tenant and to no one else.<sup>3</sup>

On the *first* point, this was the lease of a *furnished house*; neither the tenant, nor the military authorities, nor anyone else, could *occupy the house as a furnished house* or, while the house was under requisition, use the furniture.<sup>4</sup> On the *second* point:

"Where actual total destruction takes place, the fact that it is speedily reparable, and therefore only temporary in its effect, is not material."<sup>5</sup>

Subject to the *de minimis* rule, landlord and tenant are both "liberated" upon the "constructive total destruction of the subject" by Government requisition.

On the *third* point, in the absence of the Crown, it was not open to the court to determine who was the party entitled to "compensation." The Lord President indicated, however, that if, by the common law of Scotland, the effect of a lawful

<sup>1</sup> [1942] S.C. 61.

<sup>2</sup> [1929] S.C. 593.

<sup>3</sup> [1942] S.C., at 61.

<sup>4</sup> *Ib.*, at 62.

<sup>5</sup> *Ib.*, citing (1870), *Duff v. Fleming*, 8 Macph. 769, 772, *per* Lord Neavis. A stipulation in a lease by which the tenant was bound to keep the subjects in repair did not bind him to repair damage by fire; the tenant was entitled to abandon.

requisition which makes the land unoccupiable is to dissolve a given lease, it would require "plain terms or very clear implication" to provide that the requisition was not to have "the usual legal effect."<sup>1</sup>

Lord Moncrieff said that since *Duff v. Fleming*,<sup>2</sup>

"any actual, though temporary, physical destruction of the leasehold subjects is a *rei interitus* which entitles the tenant *ex debito justitiae* to avoid the lease and not merely to claim an equitable abatement of rent. In the case of a notional rather than an actual destruction of the subjects, the same doctrine was applied in 1929 in the case of *Tay Salmon Fisheries v. Speedie* . . ."<sup>3</sup>

(d) *Tay Salmon Fisheries Case ; rei interitus*

It may here be convenient to give an account of the *Tay Salmon Fisheries Case*.<sup>3</sup> A fishery company were the tenants of salmon fishings under a lease for nineteen fishing seasons. By a clause in the lease the tenants were to have no claim for compensation or to deduction from rent in consequence of any legislative measures affecting fishing. During the currency of the lease, the Air Council made bye-laws converting the greater part of the area of the fishings, for four days every week throughout the year, into a danger zone for aerial gunnery and bombing practice, during which it was illegal for any person to be within its limits or to bring or keep any property there. The effect of the bye-laws, the Court of Session held, was to cause "total eviction" from the fishings, and since the landlords could not maintain the tenants in possession, as it was their duty to do, the tenants were entitled to abandon the lease.

Lord President Clyde pointed out that a marine salmon fishery must have its stake-nets continuously maintained and attended, with boats and gear throughout the fishing season.<sup>4</sup> The gunnery and the bombing range extended over the whole site and the targets were in the midst. It was impracticable for the tenants to exercise the fishery without committing illegalities and exposing their property to the risk of injury for which no compensation was payable. They had been "effectually deprived of the possession of the fishery under their lease."<sup>4</sup> Where eviction is *partial*, both parties take their chance.

"But if it is such as totally to destroy the tenant's enjoyment of the subject beyond any reasonable immediate possibility of restoration, the obligation of warrandice cannot but result in a liberation of the tenant from the bonds of the

<sup>1</sup> [1942] S.C., at 63.

<sup>2</sup> (1870), 8 Macph. 769.

<sup>3</sup> [1929] S.C., 593 ; [1942] S.C., at 63.

<sup>4</sup> [1929] S.C., at 600.

lease ; for, as it turns out, the lessor has warranted the tenant in a possession in which he is unable to maintain him to any extent."<sup>1</sup>

Lord Sands said that this was a case of *rei interitus* :

" The subject of tenancy is the free exercise of the right of salmon fishing, and that has been substantially destroyed, or, if one prefers so to put it, sterilised, or rendered incapable of profitable use."<sup>2</sup>

*Note.*—For recent cases in the United States upon frustration as applied to a lease, see *Comment* by M. Groefsevre, in (1944), 43 Mich. L. Rev. 598-604. In *Wood v. Bartolino* (N.M. 1944), 146 P. (2d 883), the New Mexico Supreme Court held that frustration did not apply to release lessees of a filling station from a covenant to pay rent. The appellees had leased a building for an automobile service station, for five years from June, 1939. The premises were so used until February, 1942, when the appellees, operating at an increasing loss, ceased business, offered to restore possession to the lessor and sought to avoid liability for rent for the remainder of the term on the ground that, owing to rationing, the purpose of the lease had been " frustrated." The court held that the tenant was not excused : performance had merely become unprofitable. No regulations prohibited the sale of those goods or deprived appellees of the use of the premises as a filling station (*op. cit.*, 601, 602).

A contrary conclusion was reached in a Californian case, *Lloyd v. Murphy* (Cal. Ct. App., 1943), 142 P. 2d. (939) (*op. cit.*, 602), excusing the lessee when a statute or regulation deprived him of the " beneficial use " of the property. The premises were leased for an automobile sales room (90 per cent. of the business was the sale of new cars). The court released the tenant : restrictions on the sale of new cars had defeated the purpose of the lease.

Recent New York decisions accord with the New Mexico decision which relied on *Colonial Operating Corporation v. Hannan Sales and Service, Inc.* (1943), 265 App. Div. 411, 39 N.Y.S. (2d) 217 (*op. cit.*, at 603)—the leading case on frustration as applied to a lease. The facts were similar to those in *Lloyd v. Murphy*. The lease restricted the premises to the sale of automobiles, but not new cars alone : " the primary purpose of the lease as to use was not frustrated."

See Schroeder, *The Impact of The War on Private Contracts* (1944), 42 Mich. L. Rev., 603, 607, 610.

<sup>1</sup>[1929] S.C., at 602.

<sup>2</sup>*Ib.*, at 604.

## PART IV

### EFFECTS OF FRUSTRATION

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### CHAPTER XXI

#### NEW PRINCIPLES: THEIR ORIGINS

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#### A. PRINCIPLES

##### I. DATE OF FRUSTRATION, MATERIAL

THE effect of frustration upon the rights and liabilities of the parties depends upon the date when the contract was *frustrated*.

##### II. ON OR AFTER 1ST JULY, 1943

If the contract was frustrated *on or after 1st July, 1943*, then subject to any provision in the contract which is intended to

have effect in the event of frustration, the rights and liabilities of the parties will be adjusted in accordance with the provisions of the *Law Reform (Frustrated Contracts) Act, 1943*.<sup>1</sup>

### III. BEFORE 1ST JULY, 1943

If the contract was frustrated *before 1st July, 1943*, the rights and liabilities of the parties are governed by these rules:—

1. "If the contract itself on its true construction stipulates for a particular result which is to follow in regard to money already paid, should frustration afterwards occur, this governs the matter."<sup>2</sup>

(a) *Advance freight* is, by custom, an "irrevocable payment": if the voyage is frustrated the payment is not recoverable.<sup>3</sup>

(b) "*Absolute or final or out-and-out payments*" are not recoverable.<sup>4</sup>

2. "If the contract is 'divisible' in the sense that a sum is to be paid over in respect of completion of a defined portion of the work, it may well be that the sum is not returnable if completion of the whole work is frustrated."<sup>5</sup>

3. When frustration supervenes, "the contract can no further be performed by either party, it remains a perfectly good contract up to that point, and everything previously done in pursuance of it must be treated as rightly done, but the parties are both discharged from further performance of it."<sup>6</sup>

This principle applies to *every* frustrated contract.

4. If money has been paid in advance under a contract which becomes frustrated, and the payer has received *nothing* in return, the *consideration has totally failed* and he is entitled to his money back.<sup>7</sup>

5. Where the consideration has *totally failed*, money paid in advance must be returned even though the recipient may have

<sup>1</sup> Section 2 (1) and (3). *Infra*, Chap. XXVII, 681.

<sup>2</sup> *Per* Viscount Simon, L.C., in *The Fibrosa Case* [1943] A.C. 32, at 42, 43. See also *per* Lord Atkin, at 55, and *per* Lord Roche, at 76. *Infra*, Chap. XXIV.

<sup>3</sup> *Byrne v. Schiller* (1871), L.R. 6 Ex. 319; *Allison v. Bristol Marine Insurance Company* (1875), 1 A.C. 209, 253, *per* Lord Selbourne. See also *The Fibrosa Case* [1943] A.C. 32, at 43, *per* Viscount Simon, L.C.; *per* Lord Wright, at 67; *per* Lord Porter, at 79; *infra*, 625, 626, 633, 648.

<sup>4</sup> *Per* Lord Roche in *The Fibrosa Case* [1943] A.C. 32, at 74. See also *per* Lord Wright, at 67; and *per* Lord Porter, at 83; *infra*, 648, 650, 652.

<sup>5</sup> *Per* Viscount Simon, L.C., at 42. See at 77, *per* Lord Porter; *infra*, 632, 651.

<sup>6</sup> *Chandler v. Webster* [1904] 1 K.B. 493, 494, a passage accepted as correct by Viscount Simon, L.C., in *The Fibrosa Case* [1943] A.C. 32, 46; *infra*, 634.

<sup>7</sup> *The Fibrosa Case* [1943] A.C. 32, 46, *per* Viscount Simon, L.C.; *per* Lord Atkin, at 53, 55; *per* Lord Russell of Killowen, at 56, 57; *per* Lord Macmillan, at 61; *per* Lord Wright, at 64, 72; *per* Lord Roche, at 75; *per* Lord Porter, at 83, 84; *infra*, 634, 639, 640, 641, 645, 651, 653.

incurred expense in the partial carrying out of the contract, or executed almost the whole of the contractual work.<sup>1</sup>

"The right to claim repayment of money paid in advance must, in principle, . . . attach at the moment of dissolution; the payment was originally conditional; the condition of retaining it is eventual performance. Accordingly, when that condition fails, the right to retain the money must simultaneously fail."<sup>2</sup>

6. "If a divisible part of the contract has wholly failed and part of the consideration can be attributed to that part, that portion of the money so paid can be recovered . . . A partial failure of consideration gives rise to no claim for recovery of part of what has been paid."<sup>3</sup>

### B. ORIGINS: 1903-1943

The evolution of these principles will now be examined.

A rule which had prevailed for almost forty years was reversed by the House of Lords who, by going back to the principles which Lord Mansfield had laid down, restated the law of recovery upon a total failure of consideration.

The effects of frustration have since been reformed by a recent statute which was based upon the recommendations of the Law Revision Committee.

I. The "*Coronation Cases*"<sup>4</sup>—in which the "rule in *Chandler v. Webster*"<sup>5</sup> was first laid down—are the starting point. This rule was that in cases of frustration "the loss lies where it falls" and that a person who had paid money in advance could not recover it. The contract was not "wiped out altogether": the parties were merely released from further performance: therefore the doctrine of failure of consideration, it was said, did not apply. This rule, constantly applied, but frequently criticised—with particular vigour in a Scottish appeal before the House of Lords twenty years ago<sup>6</sup>—prevailed for nearly forty years until recently reversed by the House of Lords.<sup>7</sup>

II. In May, 1939, the *Law Revision Committee* criticised the rule with severity, and after considering several possible solutions, recommended legislation whereby, upon frustration of a contract, money paid before frustration should be recoverable, subject to deduction of a fair allowance for expenditure incurred by the

<sup>1</sup> *Ib.*, at 49, per Viscount Simon, L.C.; at 54, 55, per Lord Atkin; at 59, per Lord Macmillan; at 72, per Lord Wright; at 76, per Lord Roche; at 78, per Lord Porter; *infra*, 636, 639, 641, 649, 651.

<sup>2</sup> *Ib.*, at 65, per Lord Wright; *infra*, 647.

<sup>3</sup> *Ib.*, at 77, per Lord Porter; *infra*, 651.

<sup>4</sup> *Infra*, Chap. XXII, 592.

<sup>5</sup> [1904] 1 K.B. 493, 499, per Collins, M.R.; *infra*, 597.

<sup>6</sup> *The Cantiani Case* [1924] A.C. 226, 259, per Lord Shaw of Dunfermline.

<sup>7</sup> *The Fibrosa Case* [1943] A.C. 32; *infra* Chap. XXIV, 627.

payee in the performance of, or for the purpose of performing, the contract.<sup>1</sup> Four years passed before the recommendation was translated into statute.<sup>2</sup>

III. Meanwhile, in June, 1942, and for the first time, the rule directly came before the House of Lords. Many lawyers thought—and they were confirmed by the reasoning of the committee (of which Lord Wright is the chairman)—that the rule was part of the law of England and could only be altered by legislation.<sup>3</sup> *The Fibrosa Case*<sup>4</sup> is a landmark in English law. The House, re-examining the origins of the rule, decided that the reasoning was unsupported by principle or authority.

1. "The man who pays money in advance on a contract which is frustrated and receives nothing for his payment is entitled to recover it back."<sup>5</sup> If the consideration has *totally* failed—subject to any provision, express or implied, in the contract—he gets his money back. This was merely "the application of an old-established principle of the common law"—the action for money had and received. Why, then, is this case a landmark? Indeed, by the statute of 1943 it ceases to apply to any case where frustration occurs on or after 1st July, 1943.

2. The House, for the first time, unequivocally and with far-reaching effect, reaffirmed and restated the juristic basis of the action for money had and received. The claim rests not on contract, but in *quasi-contract*, Lord Wright declared—a third category of the common law, distinct from either contract or tort.<sup>6</sup> No promise was made to repay, nor does the law imply a promise. It is an *obligation* that, in the circumstances which have happened, the law *imposes* :—

"The defendant has the plaintiff's money. There was no intention to enrich him in the events which happened."

<sup>1</sup> (1939), Cmd. 6009, *infra*, Chap. XXIII, 619, 624, 625.

<sup>2</sup> Law Reform (Frustrated Contracts) Act, 1943. *Infra*, Chap. XXVII, 681.

<sup>3</sup> See Note by "P. H. W." (1941), 57 L.Q.R. 439, 440, doubting whether the House of Lords could overrule *Chandler v. Webster* [1904] 1 K.B. 493, especially since the doctrine had been referred to the Law Revision Committee, which "implied a conviction in high quarters that the only way of getting rid of it was by legislation." Indeed, the rule had been affirmed by Atkin, J., in *The Stathatos Case* (1917), 33 T.L.R. 390, 392, 392, *infra*; and in *The Russkoe Case* (1922), 10 Ll. L. Rep. 214, 216-218, and in *The French Marine Case* [1921] 2 A.C. 494. The House of Lords—the question was not directly in issue—regarded the rule as the law; Lord Sumner referred to the consequences of frustration as stated by Collins, M.R., in *Elliott v. Crutchley* [1904] 1 K.B. 565, 568, and Lord Parmoor stated the prevailing rule without ambiguity [1921] 2 A.C. 523. So indeed, it appeared to the author. The committee did not doubt the validity of the rule. The learned editor of the L.Q.R., who took the other view (at 440, 441), was justified by the *Fibrosa Case* [1943] A.C. 32.

<sup>4</sup> [1943] A.C. 32; *infra*, Chap. XXIV, 627. <sup>5</sup> *Ib.*, at 55, *per* Lord Atkin.

<sup>6</sup> *Ib.*, at 61; *infra*, 642. Contrast the speech of Viscount Haldane in *Sinclair v. Brougham* [1914] A.C. 398, 415, 417.

<sup>7</sup> [1943] A.C., at 64.



In 1760 Lord Mansfield had said :—

"In one word the gist of this action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money."<sup>1</sup>

This was the basis of the modern law of quasi-contract :—

"in substance the juristic concept remains as Lord Mansfield left it."<sup>2</sup>

3. Seven peers sat ; five great common lawyers ; all, of eminence. Every speech—if, with great respect, one may say so—exhibits, at the highest, the judicial process and judicial valour. Viscount Simon, the Lord Chancellor, with the utmost lucidity analysed the origin of the rule which was being over-ruled and plainly based his opinion upon quasi-contract.<sup>3</sup> Lord Wright—whose extra-judicial opinions have pleaded for an open recognition of the category of *quasi-contract* or *restitution* in cases of *unjust enrichment* or *unjust benefit*<sup>4</sup>—has now been enabled to declare himself judicially and to integrate his reasoning into the secular structure of English law.

4. The rule laid down by the House, it was admitted, worked but "rough justice."<sup>5</sup>

"One party may have almost completed extensive work. He can get no compensation. The other party may have paid the whole price, and if he has received but a slender part of the consideration he can get no compensation. At present it is plain that if no money has been paid on the contract there is no legal principle by which loss can be made good."<sup>6</sup> Only where the failure of consideration was total, could there be recovery—

"... the English common law does not undertake to apportion a prepaid sum in such circumstances . . ."<sup>7</sup>

*Obiter dicta* these, but of the greatest weight. Some have wished that the House had exhibited even greater valour : would it not be just to hold that even were the failure of consideration partial, money prepaid should be returned and that a counter-claim should lie for work done in and about the performing of the contract ? Has the House closed the door upon this submission ? So it would appear ; the argument is, perhaps, too late in view of the unanimity of the great common lawyers of the nineteenth century.<sup>8</sup>

<sup>1</sup> *Moses v. Macferlan* (1760), 2 Burr. 1005, 1012 ; *infra*, 643, 659.

<sup>2</sup> *Per* Lord Wright, in *Fibrosa Case* [1943] A.C. 32, 63 ; *infra*, 644.

<sup>3</sup> *Ib.*, at 47 ; *infra*, 634, 635.

<sup>4</sup> *Legal Essays and Addresses*, xiv, xv, 26, 34–37, 60, 207, 403–404 ; *infra*, 667.

<sup>5</sup> *Per* Lord Wright, in *The Fibrosa Case* [1943] A.C. 32, 72 ; *infra*, 649.

<sup>6</sup> *Ib.*, at 54, 55, *per* Lord Atkin ; *infra*, 639.

<sup>7</sup> *Ib.*, at 49, *per* Viscount Simon, L.C. ; *infra*, 636.

<sup>8</sup> Compare *Whincup v. Hughes* (1871), L.R. 6 C.P. 78 ; *infra*, 675–677.

5. Not idly or without effect were these *obiter dicta* spoken :

"it must be for the Legislature to direct whether provision should be made for an equitable apportionment of prepaid moneys which have to be returned by the recipient . . ."<sup>1</sup>

Courts of Equity had evolved "a fairer method of apportioning an entire consideration," e.g., a premium where a partnership had been prematurely dissolved : "Some day the Legislature may intervene to remedy these defects."<sup>2</sup> That the law should make some provision for recovery of an equitable proportion "might be desirable" : so the Law Revision Committee had recommended. "But without an Act of Parliament it is difficult to determine what sum shall be recoverable and on what principles."<sup>3</sup>

IV. A year later, under the ægis of the Lord Chancellor, the hope was fulfilled. The *Law Reform (Frustrated Contracts) Act*, 1943, introduced in June, 1943, by Viscount Simon, applies to contracts (with specified exceptions) frustrated *on or after 1st July*, 1943. Subject to any provision in the contract intended to have effect in the event of frustration, and to the severability of a contract, *all* sums paid before frustration are recoverable. But the court may allow the recipient to *retain* the whole or part of a prepaid sum if he has incurred *expenses* in, or for, the performance of the contract. A person who, before the time of discharge, has obtained a valuable benefit must pay the other party, having regard to all the circumstances of the case, its fair value to himself.<sup>4</sup>

<sup>1</sup> *Per* Viscount Simon, L.C., in *The Fibrosa Case* [1943] A.C. 32, at 49 ; *infra*, 637.

<sup>2</sup> *Per* Lord Wright, *ib.*, at 72 ; *infra*, 649.

<sup>3</sup> *Per* Lord Porter, *ib.*, at 78 ; *infra*, 651.

<sup>4</sup> Sections 1 (2) (3) ; 2 (3) (4) ; *infra*, Chap. XXVII, 684, 686, 690, 691.

## CHAPTER XXII

### CORONATION CASES ; TO CANTIARE

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## A. THE CORONATION CASES

## I. MISTAKE

OF "The Coronation Cases," *Krell v. Henry*<sup>1</sup> decided that "money paid over when the frustration took place was not in law payable."<sup>2</sup>

In *Clark v. Lindsay*<sup>3</sup> and *Griffith v. Brymer*<sup>4</sup> "in each case the contract was entered into under a mistake of fact as to the state of the King's health at the time when they were made, and, therefore, both were void *ab initio*."<sup>2</sup>

## II. EXPRESS PROVISION

1. In *Victoria Seats Agency v. Paget*,<sup>5</sup> P agreed, for £75, to let certain rooms in which to erect seats "for the coronation procession" on the 27th of June, stipulating:—

"Should the said procession not pass these premises I agree to refund to you the money paid to me as soon as the official announcement is made that it will not pass."

The plaintiffs had paid their money and reclaimed it.

2. In *Fenton v. Victoria Seats Agency*,<sup>6</sup> F sued to recover money paid for seats on the following terms:—

"In the event of . . . the processions being postponed, the money will be credited to the same or similar accommodation when the processions do take place, and in the event of . . . the processions being abandoned the money paid . . . will be returned, less ten per cent."

In both cases Wills, J., gave judgment for the defendant.

3. In *Elliott v. Crutchley*,<sup>7</sup> a caterer agreed to supply refreshments at a fixed price on the occasion of a naval review to be held on 28th June, in connection with the coronation, £300 to be paid on account on the Monday before the review day. The respondents agreed, adding a postscript:—

"It is of course understood that in the event of the cancellation of the review before any expense is incurred by the caterer, there shall be no liability on our side."

On 23rd June, the respondents sent a cheque for £300. On 24th June it was known that owing to the King's illness the review would be cancelled. Payment of the cheque was stopped

<sup>1</sup> [1903] 2 K.B. 740.

<sup>2</sup> Per Lord Porter in *The Fibrosa Case* [1943] A.C. 32, 80.

<sup>3</sup> (1903), 19 T.L.R. 202, 203; 88 L.T. 198, 201: "they contracted on the basis of there being a substituted or postponed procession," per Lord Alverstone, C.J.

<sup>4</sup> (1903), 19 T.L.R. 434. Neither party was aware that the coronation had been postponed when the contract was made.

<sup>5</sup> (1903), 19 T.L.R. 16.

<sup>6</sup> (1903), 19 T.L.R. 16.

<sup>7</sup> [1903] 2 K.B. 476, [1904] 1 K.B. 585; [1906] A.C. 7.

and the caterers sued upon it. They had spent £20 in crockery but had incurred no expense in providing refreshments. The respondents were held not liable either in respect of refreshments, or upon the cheque.

### III. BLAKELEY V. MULLER; AND OTHER CASES

1. In *Blakeley v. Muller & Co.*,<sup>1</sup> B's agent paid fifteen guineas for three numbered seats to be erected on the ground floor of a shop from which to view the coronation procession on 27th June, 1902. M. & Co. were to erect, and did erect, the seats. Upon cancellation of the procession, B unsuccessfully sued for his money back.

Lord Alverstone, C.J., in the Divisional Court, said that neither party could have sued *on the contract* for anything to be done under it after the procession was abandoned. The company could not be compelled to complete the seats, and B had no right to use them and if no money had then become due, could not be sued for the price.

"I think that each party must rest in the position in which he is found to be when the event occurs which makes the contract impossible of performance, unless there is something special in the terms of the contract which gives one or other of the parties a different right."<sup>2</sup>

Wills, J., said that the argument for the plaintiff must be that the contract was rescinded *ab initio*; for that contention there was no authority.

"The process of constructing a hypothetical contract by supposing what terms the parties would have arrived at if they had contemplated the possibility of what was going to happen is, to my mind, very unsatisfactory. Probably, in the present case, the defendants would have stipulated for compensation for their outlay, and the plaintiffs for a return of their money; but it is impossible to say with any certainty what the result of their bargaining would have been."<sup>3</sup>

Channell, J., in an important judgment, declared:—

"If the money was payable on some day subsequent to the abandonment of the procession, I do not think it could have been sued for. If, however, it was payable prior to the abandonment of the procession, the position would be the same as if it had been actually paid and could not be recovered back, and it could be sued for. All *Taylor v. Caldwell* says

<sup>1</sup> [1903] 2 K.B. 760.

<sup>2</sup> [1903] 2 K.B. 761. Lord Alverstone, C.J., disagreed with Darling, J., who had held in *Krell v. Henry* (1902), 18 T.L.R. 823, 825, that K could recover his deposit.

<sup>3</sup> *Id.*, at 762.

is that the parties are to be excused from the performance of the contract, and *Appleby v. Myers* says from the further performance. *It is impossible to import a condition into a contract which the parties could have imported and have not done so.* All that can be said is that, when the procession was abandoned, the contract was off, not that anything done under the contract was void. The loss must remain where it was at the time of the abandonment. It is like the case of a charterparty where the freight is payable in advance, and the voyage is not completed, and the freight therefore not earned. Where the non-completion arose through impossibility of performance the freight could not be recovered back. Of course, if the contract for seats had been made subsequent to the abandonment of the procession, that would be different altogether. Then the money could be recovered."<sup>1</sup>

In a sentence, the money could not be recovered *in contract*.

2. In *The Civil Service Co-operative Society Case*,<sup>2</sup> heard by the Court of Appeal, The Earl of Halsbury, L.C., cited this passage: with every word of it he concurred.<sup>3</sup>

By a charterparty dated March, 1902, the Society agreed to hire, and the company to let, the company's steamer for three days from the day before the naval review to be held at Spithead on the occasion of the coronation in June or July, 1902. The steamer was to take up passengers, proceed to Spithead for the review, and return to London on the third day of the hiring. The Society would pay a lump sum of £1,500, £250 on signing the charter, the balance ten days before the review. The money was paid accordingly, the review being fixed for 28th June. On 25th June, in consequence of the King's illness, the review was postponed and the Society intimated to the company that they would not require the steamer. Before postponement the company had incurred £500 in fitting up the steamer. The review was not held until August, 1902, and the Society sued to recover the £1,500 as money paid on a consideration which had failed. Bigham, J., held that the payment was not conditional on the review taking place in June or July and that the company was entitled in law to retain it. An appeal was dismissed.

3. In *Lumsden v. Barton & Co.*,<sup>4</sup> L had paid for seats which B. and Co. were erecting in order to view the coronation procession on 26th June. The card of admission and the receipt explicitly said so. B. & Co. had erected the seats; £591 had been received for seats; the luncheon was included and part

<sup>1</sup> [1903] 2 K.B. 762, 763; author's italics. This judgment is closely analysed in *The Fibrosa Case* [1943] A.C. 32; *infra*, Chap. XXIV; *infra*, 627.

<sup>2</sup> *Civil Service Co-operative Society v. General Steam Navigation Company* [1902] 2 K.B. 756.

<sup>3</sup> *Ib.*, at 764.

<sup>4</sup> (1902), 19 T.L.R. 53,

of the food had been bought. Expenses amounted to £291; L failed to recover his money after the postponement.<sup>1</sup>

#### IV. CHANDLER v. WEBSTER

In *Chandler v. Webster*,<sup>2</sup> the question arose in the neatest form.<sup>3</sup> This is "the *locus classicus* for the view which has hitherto prevailed," observed Viscount Simon, L.C., in *The Fibrosa Case*.<sup>4</sup>

The defendant had agreed to let a first-floor room in Pall Mall to the plaintiff in order to view the coronation procession on 26th June, 1902. The price was £141 15s., payable in advance. On 10th June, the plaintiff wrote, confirming "my purchase of the first-floor room" and authorising the defendant to sell separate seats in the room, for which he could erect a stand. If, by 26th June, the seats did not realise £141 15s., he agreed to pay the balance to make up that amount. On 19th June, the plaintiff paid £100 on account. Owing to the illness of the King the procession was abandoned. The plaintiff claimed the return of £100, and the defendant counter-claimed the unpaid balance of £41 15s. Wright, J., held that C could not recover the £100, that the balance was not payable until after the procession and, consequently, that W was not entitled to it.

The case was heard and judgments were delivered on the same day. The principles and authorities in the action for money had and received were not considered.<sup>5</sup> The Court of Appeal held that the plaintiff was not entitled to recover the £100 and that the defendant was entitled to payment of the balance accrued before it became impossible to hold the procession.

The leading judgment was given by Collins, M.R., "a master of the common law, whose opinion the profession have always rightly held in the greatest respect."<sup>6</sup> In his opinion (dealing first with the counter-claim for the balance), the price of the room was payable before the procession became impossible; that the procession should take place was not a condition precedent to payment.<sup>7</sup> "The fulfilment of the contract having become impossible through no fault of either party, the law leaves the parties where they were, and relieves them both from further performance of the contract."<sup>8</sup> If the duty to pay did not arise until after the procession was held, the hirer was

<sup>1</sup> (1902), 19 T.L.R., at 54. See *per* Darling, J., and see *McElroy & Glanville Williams, The Coronation Cases III* (1941), 4 Mod. L. Rev. 241-260; 5 Mod. L. Rev. 1-20.

<sup>2</sup> [1904] 1 K.B. 493, 498. See *Report of Buckmaster Committee* (1918), Cd. 8975, para. 10: *Legal Essays and Addresses*, 257, 258; (1939), Cmd. 6009.

<sup>3</sup> *Per* Lord Atkin, in *The Fibrosa Case* [1943] A.C. 32, 51; *infra*, 637.

<sup>4</sup> *Ib.*, at 45; *infra*, 633.

<sup>5</sup> See *per* Lord Wright, in *The Fibrosa Case* [1943] A.C. 32, 69; *infra*, 648.

<sup>6</sup> *Per* Lord Atkin in *The Fibrosa Case* [1943] A.C. 32, 51; *infra*, 637.

<sup>7</sup> [1904] 1 K.B., at 497.

<sup>8</sup> *Ib.*, at 498.

relieved from that obligation ; if the duty to pay accrued before the procession was held, " the hirer, if he has paid, cannot get his money back, and, if he has not paid, is still liable to pay."<sup>1</sup> The defendant was entitled to succeed on his counter-claim.

The plaintiff rested his claim for a return of the £100 on a *total failure of consideration* ; namely, the failure to hold the procession. Upon the principle laid down in *Taylor v. Caldwell*,<sup>2</sup> when the contract has become impossible of performance,

" it remains a perfectly good contract up to that point, and everything previously done in pursuance of it must be treated as rightly done, but the parties are both discharged from further performance of it."<sup>3</sup>

" So far the statement is unassailable," said Lord Atkin.

The Master of the Rolls proceeded :—

" If the effect were that the contract were wiped out altogether, no doubt the result would be that money paid under it would have to be repaid as on a failure of consideration. But that is not the effect of the doctrine, it only relieves the parties from further performance of the contract, therefore the doctrine of failure of consideration does not apply."<sup>4</sup>

The contract is not rescinded *ab initio* ; it is simply dissolved from the date of frustration. " Therefore," argued Collins, M.R., " the doctrine of failure of consideration does not apply."

The Master of the Rolls was constrained to admit that—

" the rule adopted by the courts in such cases is, I think, to some extent an arbitrary one, the reason for its adoption being that it is really impossible in such cases to work out with any certainty what the rights of the parties in the event which has happened should be."<sup>5</sup>

Time has passed ; the position of the parties may have changed ; it is impossible " to adjust or ascertain their rights with exactitude." Hence, the law treats everything already done in pursuance of the contract " as validly done, but relieves the parties of further responsibility under it."<sup>6</sup>

<sup>1</sup> [1904] 1 K.B., at 499.

<sup>2</sup> (1863), 3 B. & S. 826, *supra*; 459.

<sup>3</sup> *Ib.*, at 499. No such question arose in *Taylor v. Caldwell* or *Appleby v. Myers*, as the Law Revision Committee point out. In *Taylor v. Caldwell* nothing had been paid. Buckland observes : " If there had been a deposit, on this reasoning, it ought to have been recoverable, subject to adjustment, and probably would have been, though later cases take a different line " (46 Harv. L. Rev., at 1287, 1288). Further : " *Appleby v. Myers* merely decided that from the terms of the contract the job was indivisible, so that nothing was due thereon until it was completed. Yet this case is erroneously invoked in subsequent cases " (*ib.*, at 1289). The two propositions, that further performance cannot be claimed and that accrued rights will not be disturbed, are inconsistent (*ib.*, at 1295).

<sup>4</sup> *The Fibrosa Case* [1943] A.C. 32, 51.

<sup>5</sup> [1904] 1 K.B., at 499.

<sup>6</sup> *Ib.*, at 500. Collins, M.R., restated this principle in *Elliott v. Crutchley* [1904] 1 K.B. 565, 569 :

" In the absence of any special provisions made by the parties with reference to the contingency of further performance of the contract becoming impossible,



Lord Atkin, in *The Fibrosa Case*,<sup>1</sup> found it difficult to understand how "this great lawyer came to the conclusion that the claim for money paid on a consideration which wholly failed could only be made when the contract was wiped out altogether."

Mathew, L.J., put his view on the following ground :—

"I think the payment of the £100 by the plaintiff was intended to be a *final payment* in pursuance of the contract, and I do not think such a payment can be recovered back, unless there was some condition express or implied in the contract providing for its return in the event which happened. In my opinion there is no ground for supposing in this case that there was any such condition, or that it was contemplated by either party that the money should be paid back if the procession did not take place."<sup>2</sup>

Lord Porter quoted Mathew, L.J.'s view, saying :—

"There are cases where the payer pays not for the performance of the receiver's promise, but for the promise itself—not for the doing of something but for the chance that it may be done."<sup>3</sup>

This, he thought, was what Mathew, L.J., meant by a "final" payment. Nevertheless, the decision was wrong, unless "there was some partial performance which I have not been able to observe in the report of the case."<sup>4</sup>

## B. ADVANCE FREIGHT IRRECOVERABLE BY CUSTOM

Where the ship or the goods have been lost and the freight is not earned, freight payable in advance is irrecoverable: *Byrne v. Schiller*.<sup>5</sup>

Cockburn, C.J., there said :—

"... by the law of England a payment made in advance on account of freight cannot be recovered back in the event of the goods being lost, and the freight therefore not becoming payable. I think it founded on an erroneous principle and

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moneys paid in accordance with the terms of the contract must remain where they were when that contingency occurs; the party who has paid them, and by the contract was bound to pay them, cannot recover them back; but, as regards future liability, the contract is at an end. It is not to be treated as rescinded *ab initio*, but both parties are excused from further performance of it. The law lays down this rule, because, the parties not having contemplated or provided for the event which has happened, it is impossible for the court to ascertain exactly what the rights of the parties should be in order to effect a *restitutio in integrum*, and therefore they must be left respectively in the positions which they occupied when the further performance of the contract was ascertained to have become impossible."

See Lord Wright's summary of the reasoning of Collins, M.R., in *The Fibrosa Case* [1943] A.C. 32, 69, and his criticisms (at 70); *infra*, 648.

Lord Sumner, in *The French Marine Case* [1921] 2 A.C. 494, 520, referred with approval to this statement of the rule by Collins, M.R.; *infra*, 601.

<sup>1</sup> [1943] A.C. 32, 52; *infra*, 637.

<sup>2</sup> [1904] 1 K.B., at 502; author's italics.

<sup>3</sup> [1943] A.C. 32, 82; *infra*, 652.

<sup>4</sup> *Ib.*, at 83; *infra*, 653.

<sup>5</sup> (1871), L.R. 6 Ex. 319, 325, 326. See (1939), Cmd. 6009, Appendix B, *infra*.

anything but satisfactory; but I am emboldened to say this by finding that the American authorities have settled the law upon directly opposite principles, and that the law of every European country is in conformity with the American doctrine and contrary to ours."<sup>1</sup>

And Byles, J., observed:—

"But the current of authority, though arising from a somewhat scanty spring, has become too strong to be resisted; it is so strong as to be binding upon us here even in a court of appeal: probably even binding on the House of Lords."<sup>2</sup> Montague Smith, J., said that the rule depended upon this: "that there is an implied understanding that it shall be made once for all and shall not be subject to any contingency."<sup>3</sup>

## C. HIRE UNDER CHARTERPARTY: PAID IN ADVANCE

### I. STATHATOS CASE: FRUSTRATION; NO RECOVERY

In the *Stathatos Case*,<sup>3</sup> the charterers of the *S.S. Parthenon* sued the owners under a charterparty, dated 30th November, 1916, for a declaration that the charterparty had been avoided,

<sup>1</sup> *Ib.*, at 325. The authorities are cited in the argument, 320–324.

<sup>2</sup> *Ib.*, at 327. See *The Fibrosa Case* [1943] A.C. 32, 43, per Viscount Simon, L.C. "a stipulation introduced into such contracts by custom, not as the result of applying some abstract principle"; at 67, per Lord Wright: "The irrecoverable value of the payment is there determined by custom or law, unless the contract provides for the contrary"; at 74, per Lord Roche: "If under a contract, payments have been made which have been variously described as absolute or final or out-and-out payments, then they are not recoverable by the party who made them. Payments of freight in advance are payments of this nature. Whatever the origin of the rule as to advance freight, under decisions now centuries old and long acted on in commerce the rule itself—that such payments of freight are final and irrecoverable payments is beyond question"; at 78, per Lord Porter: "advance freight by long custom cannot be recovered though the goods shipped are never delivered." He referred to *Allison v. Bristol Marine Insurance Company* (1876), 1 A.C. 209, 235, 236.

For the cases, see *Watson & Co. v. Shankland* (1871), 10 M. 142, 145–150. The note of an anonymous case reported by Shower in the time of Charles II (vol. 2, pp. 283), 291—to which the decisions are traceable—is as follows:—

"Advance paid before, if not part of freight, and named so in the charter-party, although the ship be lost before it came to a delivering port, yet wages are due, according to the proportion of freight paid before, for the freighters cannot have their money."

"The point here decided seems to have been, that if the sailors had been paid beforehand they cannot be obliged to restore the wages so paid them in advance . . ." (10 M., at 145). On the other hand, it does not follow that "a similar rule should be applied to a charterer who, for the accommodation of the shipowner, makes an advance of freight which was never earned" (*ib.*, at 146). The leading case is *De Silvale v. Kendall* (1815), 4 M. & S. 36. The American courts, on the other hand, have given effect to the general rule of maritime law that "if the voyage be not performed no freight shall be paid, or, if it has been paid, shall be returned" (10 M., at 147 *et seq.*).

<sup>3</sup> *Lloyd Royal Belge Société Anonyme v. Stathatos* (1917), 83 T.L.R. 390; affirmed (1917), 34 T.L.R. 70, 72, per Pickford, L.J.

and for the recovery of £11,922 paid under it. The owners counter-claimed for £32,845, freight due on the footing that the charterparty was in existence.

The steamer had been hired for *one round trip, Gibraltar to the United States, and thence to a safe port in the French Atlantic*. The boat was required promptly to take its place on the berth for the fortnightly line of steamers which the charterers were running from New York to Havre. The boat to take the 22nd November sailing was lost ; this was the object of the present charterparty. The monthly hire was £11,922 *'pro rata* for any fractional part of a month until redelivery. Hire was to be paid in London, monthly, in advance. The steamer, unless lost, was to be redelivered on the expiration of the charterparty. The exceptions clause included "arrests and restraints of princes, rulers and peoples." Should the steamer be lost or missing, the hire should cease from the day when last seen ; "*hire paid in advance and not earned shall be returned to the charterers*." The owners had a lien upon the cargo for hire ; the charterers, "*a lien on the steamer for all moneys paid in advance and not earned*." The steamer was to be delivered to the charterers at Gibraltar ; should the steamer not have been delivered by 10th December, the charterers had the *option to cancel*. The charter was not to be cancelled because Greece was at war on the side of Great Britain, or the Allies. On 2nd December, the steamer, because she was a Greek ship, was detained at Gibraltar ; she was not released until 10th February, 1917. Meanwhile, on 12th December, 1916, the charterers gave notice that they considered the charterparty at an end. They demanded back the month's hire which, on 2nd December, they had duly paid in advance.

Atkin, J., said that the only adventure contemplated was one voyage outwards to New York and thence to Havre ; both parties knew that time was of the essence of the charterparty. The parties adopted the form of a time charter ; "in substance, the adventure was a charter for a voyage with freight payable at a time rate." Upon the detention by the British Government for a duration uncertain, which might be prolonged, the adventure became frustrated and the contract was dissolved. Atkin, J., thought that he was bound by authority to treat frustration of voyage as based upon "the existence of an implied contract" ; the legal consequences were the same whether the implied contract related to contracts *de certo corpore*, contracts of service, or contracts assuming for their foundation the continuance of a particular state of things.<sup>1</sup>

<sup>1</sup> (1917), 33 T.L.R., at 392. Atkin, J., adopted Bailhache, J.'s definition of frustration, in *The Weidner Hopkins Case* [1917] 1 K.B. 242. He cited Earl Halsbury's judgment in *The Civil Service Case* [1903] 2 K.B. 704, *supra*, and the judgment of Channell, J., in *Blakeley v. Muller* [1903] 2 K.B. 760n ; *supra*, 594.

It had been decided that—

“Where a contract becomes dissolved by reason of the operation of the implied condition in cases *de certo corpore*, or of personal service, the parties are left *rebus sic stantibus* with no right to recover in respect of performance made or partly made before the dissolution, whether by way of payment, or of services rendered, or work done, provided that no right of action had accrued under the contract before the dissolution.”<sup>1</sup>

“I think,” he continued, “that the doctrine in this case, as in others, works but a rough adjustment of the rights of the parties, and may involve a hardship.”<sup>2</sup>

Neither expressly nor “by reasonable implication” had the parties provided for the return of the hire *in the event that happened*. The charterparty contemplated “fulfilment of the contract, not its dissolution.”<sup>3</sup> The return of the hire, if the ship was lost or missing, excluded a case where the contract was dissolved in other ways; a lien over the ship for moneys paid in advance, and not earned, did not indicate any right in the charterers where the charter was *dissolved*, and the charterers’ control over the ship was gone.

The decision was approved on appeal.<sup>4</sup>

## II. FRENCH MARINE CASE : NO ADJUSTMENT

Where a steamer, chartered by time charter which provided for the payment of a fixed hire per month and *pro rata* for any part of a month until redelivery to the owners, was requisitioned, the charterers were *not* entitled, upon frustration of the adventure, to *pro rata* adjustment : *The French Marine Case*.<sup>5</sup>

On 13th March, 1919, the *French Marine* chartered the *S.S. Ardoyne* for four calendar months from the time when the steamer was placed at the charterers’ disposal. The charterers were to pay £9,250 hire per month and *pro rata*

<sup>1</sup> See note 1, *supra*, p. 600.

<sup>2</sup> *Ib.* In *The Fibrosa Case* [1943] A.C. 32, 55, where the authorities were re-examined, Lord Atkin joined in reversing the rule, saying —

“The man who pays money in advance on a contract which is frustrated and receives nothing for his payment is entitled to receive it back”; *infra*, 639.

<sup>3</sup> 33 T.L.R., at 393.

<sup>4</sup> (1917), 34 T.L.R. 70, 72. Lord Wrenbury, in *The French Marine Case* [1921] 2 A.C. 494, 524, doubted whether Pickford, L.J., was correctly reported.

<sup>5</sup> *French Marine v. Compagnie Napolitaine d'Eclairage et de Chauffage par le Gaz* [1921] 2 A.C. 494. So held by Lords Dunedin, Sumner and Parmoor (Viscount Finlay and Lord Wrenbury dissenting).

For a critique of this case, see *R. G. McElroy v. Glanville Williams, The Coronation Cases II* (1941), 5 Mod. L. Rev. 10-13; and Glanville Williams, in *Law Reform (Frustrated Contracts) Act, 1943*, 76-78.

for any fractional part of a month, *until redelivery to the owners at a United kingdom coal port ; payment in London monthly, in advance.* Should the steamer be on a voyage at the expiration of the period fixed, the charterers were to have the use of the steamer at the stipulated rate to enable them to complete the voyage, provided that the voyage was reasonably calculated to be completed about the time fixed for the completion of the charter. Money in dispute was to be deposited in a bank in the joint names of the parties at the place of payment of the hire, until the dispute was settled by arbitration. In the event of a breakdown of machinery, there would be a cesser of hire. Should the steamer be lost or missing, the hire should cease from the date when she was lost or last spoken or last seen, and *hire paid in advance and not earned should be returned to the charterers.* The owner should have a lien upon all cargoes for hire, and the charterers were to have a lien on the steamer for all moneys paid in advance and not earned.

On 10th April, the steamer was placed at the charterers' disposal. On 16th June, the charterers had the steamer loaded at Antwerp with a cargo of coal for Toulon, with the intention that she should return to Great Britain with a cargo of mineral. On 16th July, the Shipping Controller issued his licence in respect of the *Ardoyne*, for a voyage from Antwerp to Toulon with coal, and *thence to Australia* to load for Royal Commission on wheat supplies. The *Ardoyne* proceeded from Antwerp to Toulon and delivered her cargo of coal, and the *French Marine* gave notice to the owners that on completion of the discharge of cargo she would be redelivered to the owners, since they were prevented from bringing the ship back to the United Kingdom with a cargo of ore. The owners disputed this view, but took delivery of their steamer at Toulon on 16th August, and the steamer proceeded to Australia according to the directions of the Shipping Controller.

The umpire found that from 16th August the commercial adventure was frustrated owing to the direction of the Shipping Controller that the steamer should proceed to Australia. He further found that the *French Marine* were not liable on 10th August for a full month's hire, but were only liable for a *fractional proportion* of the month's hire from 10th August to 16th August, when the steamer was redelivered.

Bailhache, J., held that a full month's hire was payable and that no portion was returnable ; his decision was affirmed by the Court of Appeal. The charterers appealed.

#### 1. *Minority : Hire Provisional ; Payment for User*

Viscount Finlay, dissenting, said that although the whole of the monthly hire was payable in advance—the clause applied to an *extension of the charter beyond the charter term*—such

payment was *provisional* merely, and if, at the end, less hire had been earned, the owners must account to the charterers for the excess.<sup>1</sup> This was the case on authority,<sup>2</sup> and equally in principle; if the user had been for one week only, it was reasonable for the owners to repay three-fourths of the month's hire received in advance.<sup>3</sup> Payment in advance was intended to secure the owner. The charterer's right to repayment rested upon the provision that if there had been less than a month's use the payment was to be in proportion only.<sup>4</sup> Under this charterparty the right to return of moneys paid in advance and not earned was conferred "in all cases." The clause giving a lien on the steamer for such moneys recognised this right and gave a special remedy for its enforcement.<sup>5</sup> The rules consequent upon frustration would not apply; upon requisition, the owners could not give the charterers the use of the vessel: "Freight ceased with the cesser of the user of the ship."<sup>6</sup> Payment of hire was *provisional and subject to account* at the end of the month.<sup>7</sup> The requisition ended the hiring and the charterers were liable for only six days in August, viz., 10th to 16th August.<sup>8</sup>

Lord Wrenbury, also dissenting, stated that upon further performance becoming impossible, the charterers' obligation to pay hire was at an end. "Hire is *prima facie* a payment for user."<sup>9</sup>

In this charter, where the steamer was lost or missing, "hire paid in advance and not earned is to be returned": a "plain indication that hire is not earned unless there be user or the opportunity of user."<sup>10</sup> In certain cases the charter contemplated the payment of fractional amounts as hire. Upon an extension of the charter, hire was to be paid "*at the rate*" stipulated by the contract, that is, at the rate of so much a month. Hire was not due for a vessel which the owners could not place at the disposal of the charterers; during that period, hire was not "earned." "The owners cannot demand and

<sup>1</sup> [1921] 2 A.C., at 504.

<sup>2</sup> *Tonnellier v. Smith* (1897), 2 Com. Cas. 258, reversing the judgment of Mathew, J. (at 121, 124). A charterparty provided that the charterer should pay the hire of a vessel at the rate of £709 per calendar month, hire to continue until redelivery and to be paid in cash, monthly, *in advance, without deduction*. The Court of Appeal (Lord Esher, M.R., Rigby, L.J., A. L. Smith, L.J., dissenting), held that the charterer must pay one month's hire at the beginning of each month, even though it was clear that the ship would be redelivered before the end of the month. See [1921] 2 A.C., at 503.

<sup>3</sup> [1921] 2 A.C., at 504.

<sup>4</sup> *Ib.*, at 504, 505.

<sup>5</sup> *Ib.*, at 506.

<sup>6</sup> *Ib.*, at 507.

<sup>7</sup> *Ib.*, at 507-509, citing *Tonnellier v. Smith* (1897), 2 Com. Cas. 258, 265.

<sup>8</sup> *Ib.*, at 510.

<sup>9</sup> *Ib.*, at 524.

<sup>10</sup> *Ib.*, at 525.

retain a full month's payment when the vessel was taken from the charterer during the currency of a month."<sup>1</sup>

This reasonable view did not find favour with the majority. The Law Revision Committee recommended that hire paid in advance under a time charter should be recoverable in the event of frustration in the same manner and to the same extent as other payments in advance made under a contract, as there recommended.<sup>2</sup> Under the Law Reform (Frustrated Contracts) Act, 1943, such hire paid in advance under a time charterparty will be recoverable (subject to the provisions of that statute), if the contract was frustrated *on or after 1st July, 1943*.<sup>3</sup>

## 2. Majority : No Repayment without Contractual Provision

Lord Dunedin said that *Tonnelier v. Smith*,<sup>4</sup> had "ruled practice so long that it ought not to be disturbed unless we thought it was clearly wrong. I cannot say that."<sup>5</sup> He admitted that he had found the question "one of extreme difficulty," on which his opinion had "repeatedly wavered."<sup>6</sup> On 16th August, did the charterers have "an accrued right to get repayment?" Payment earned by the contract is "freight for use till redelivery of the ship in terms of the contract."<sup>7</sup> Since there was *no redelivery in terms of the contract*, freight never ceased. "The case that has happened was not thought of, and consequently there is no provision for the cessation of hire in that event."<sup>8</sup>

Lord Sumner said that *Tonnelier v. Smith*,<sup>4</sup> was rightly decided. The shipowner could exercise his remedy by lien upon the day on which payment of a month's hire was due in advance; the full month's hire was then due and payable.<sup>9</sup>

"Frustration," he continued, was not before the Court of Appeal in that case. The court did not mean that in a time charter *all* advance payments are provisional or conditional.<sup>10</sup> That the charter provides for repayment in certain named events "is good ground for saying that in other events repayment is not provided for."<sup>11</sup> On the consequences of frustration, the charter was silent; the rule in *Elliott v. Crutchley*,<sup>12</sup> applied.

<sup>1</sup> [1921] A.C., at 527. Lord Wrenbury cited from *Tonnelier v. Smith* (1897), 2 Com. Cas. 258-265: "The last provision, that the charterer was to have a lien on the ship for all moneys paid in advance and not earned, makes it plain, if it were otherwise doubtful, that the payments in advance were to be provisional only and not final and would entitle the charterer to postpone delivery of the ship until the unearned payments were repaid."

<sup>2</sup> (1939), Cmd. 6009, Appendix B, *Advance Freight*; *infra*, 625, 626.

<sup>3</sup> See s. 2 (5) (a); *infra*, 692.

<sup>4</sup> (1897), 2 Com. Cas. 258.

<sup>5</sup> [1921] 2 A.C. 511.

<sup>6</sup> *Ib.*, at 512.

<sup>7</sup> *Ib.*, at 513.

<sup>8</sup> *Ib.*, at 514.

<sup>9</sup> *Ib.*, at 515.

<sup>10</sup> *Ib.*, at 516.

<sup>11</sup> *Ib.*, at 517.

<sup>12</sup> [1904] 1 K.B. 565, 568.

The money was not deposited ; it was paid. The frustration of further service was not the owners' fault, but the charterers' misfortune. If a court were to make compensation to the charterers at the owners' expense by a proportion of the month's hire, the owners would be returning too much, for they would get no compensation for losing the advantage of having the ship brought home, in large part at the charterers' expense.<sup>1</sup>

If the payment clause provided generally for a readjustment of a provisional advance by repayment of hire not earned, the clause as to breakdown was "otiose."<sup>2</sup>

"The word 'hire' does not mean a payment commensurate with user . . . Where a fractional payment constitutes hire the charter says so ; where advance payments are to be repaid, it says so ; when it makes no provision in terms, none can be supplied by your lordships. Where is there any provision for repayment in the event of frustration ? The shipowner was thereby excused from earning his hire ; why is he, nevertheless, required to repay it ?"<sup>2</sup>

### 3. Effects of Frustration : Lord Parmoor

Lord Parmoor restated the result of the authorities :

"When the terms of a contract can no longer be carried out by either party, and there is no provision in the contract to meet this contingency, the contract cannot be treated as rescinded *ab initio*, but the parties are released from further performance. Thus any payment previously made, and any legal right previously accrued, according to the terms of the agreement will not be disturbed, but the courts will decline to construct a hypothetical contract by suggesting terms which were not within the intention of the parties when the contract was entered into."<sup>3</sup>

## D. RUSSKOE CASE : CONTRACT OF SALE ; DEPOSIT IRRECOVERABLE

Where, upon frustration of the adventure, a contract of sale was dissolved and the buyer had previously *deposited part of the purchase price*, he was held not to be entitled to the return either of the whole, or of any part of, that deposit : *The Russkoe Case*.<sup>4</sup>

By three contracts made at the end of 1916 and at the beginning of 1917, machine tool makers in Halifax agreed to supply a

<sup>1</sup> [1921] 2 A.C., at 520.

<sup>2</sup> *Ib.*, at 521.

<sup>3</sup> [1921] 2 A.C., at 523, citing *The Civil Service Co-operative Society Case* [1903] 2 K.B. 756 ; *Chandler v. Webster* [1904] 1 K.B. 493 ; *The Sathatos Case* (1917), 33 T.L.R. 390 ; 34 T.L.R. 70. See per Viscount Finlay in *The Cantiane Case* [1924] A.C. 206, 241.

<sup>4</sup> *Russkoe, etc. v. John Stirk & Sons, Ltd.* (1920), 8 Ll. L. Rep. 394, per Bailhache, J. (reversed by the Court of Appeal, Bankes, Atkin and Younger, L.J.J.) ; (1922), 10 Ll. L. Rep. 164 (the arguments), 214 (the judgments).

This case must now be read in the light of *The Fibrosa Case* [1943] A.C. 32.



Russian projectile company with lathes for the manufacture of guns. *One-third of the price* was to be paid when the manufacturers had obtained *permits* to manufacture. Permits were obtained, and the Russian Company duly paid £24,453, the required deposits. Shortly afterwards, the Minister of Munitions, requiring the machinery for munition factories, prevented the manufacturers from making it for the company. The manufacturers, out of 116 lathes ordered, manufactured seventy-four, but delivered them, upon the instructions of the Government, to firms in Scotland or Japan. Upon frustration the contracts came to an end. The company *claimed the recovery of their deposits* with interest. The manufacturers, before litigation was thought of, had made various offers to repay certain *proportions* of the deposits. They had been paid by the Government for the work sent to the munition factories, but they wished to make a readjustment to cover the loss suffered from the partly finished work left on their hands.

Bailhache, J., held that the fulfilment of the contract was frustrated: "The interferences were of such a character, the delays were so great, the situation was so completely changed." He gave the company judgment for £11,000, the amount paid in respect of the seventy-four lathes which the manufacturers had delivered elsewhere. "This is what the parties would have agreed if their mind had been directed to the point."<sup>1</sup>

The Court of Appeal held that the learned judge was not entitled to construct a new contract for the parties.

### 1. RULE OF POSITIVE LAW

Atkin, L.J., put the view of Bailhache, J., thus: The doctrine of frustration depending upon an "implied term," what would the parties have agreed if they had contemplated the circumstances? They would have agreed that deposits should be recoverable.<sup>2</sup> This, said Atkin, L.J., was not the true view of the law. The doctrine is one "upon which *the courts impute to the parties* an intention in the events that have happened to terminate the contract; and the courts have gone no further than that. When the contract is terminated, then *the consequences* that follow, *follow as a matter of positive law* and do not follow from any express or implied agreement of the parties."<sup>3</sup>

It was unfortunate that the doctrine of frustration should have been based upon "implied contract"<sup>3</sup>: "Many positive rules of law" are imposed upon parties, governing the creation, performance and dissolution of a contract, independent of the

<sup>1</sup> 8 Ll. L. Rep., at 395.

<sup>2</sup> 10 Ll. L. Rep., at 216.

<sup>3</sup> 10 Ll. L. Rep., at 216: author's italics.

parties' intention.<sup>1</sup> "For my own part I see no reason why, in a certain set of circumstances which the court holds must have been contemplated by both parties as being of the essence of the contract and the continuance of which must have been deemed to have been essential to the performance of the contract, the court should not say that when that set of circumstances ceases to exist, then the contract ceases to operate."<sup>1</sup>

An analogous case was "the avoidance of a contract by illegality"—not "because of the implied intention of the parties, but because of the positive rule of law that the contract thereupon becomes avoided." Thus, also, in the contract for the sale of a specific chattel: if, unknown to the seller, it has perished at the time of the contract, the contract is "avoided"; it is similarly avoided if the chattel ceases to exist before the risk passes to the buyer. It is avoided now, not because of "any implied intention," but because "an Act of Parliament has said that it shall be avoided; that is to say, there is a positive rule of law to that effect; and I see no reason why that should not have been the principle before the Act of Parliament came along and gave statutory authority to the rule of law which avoided a contract under those circumstances."<sup>1</sup>

The theory of an implied contract was a legal fiction: "The so-called implied term is merely something that is imputed by the law to both parties." The consequences are not a matter of contract, but "follow as a matter of positive law."

## 2. HYPOTHETICAL TERM: DIFFICULT TO CONSTRUCT

The court is not entitled, when the contract is at an end, to consider "upon what terms the parties would have been likely to have agreed that the contract should come to an end." If frustration did rest upon an implied term, "the fiction would be more obvious than ever:

because I venture to doubt whether any two business people in the world would ever really make a contract that if certain unforeseen events happen the contract should be at an end and that moneys paid should remain exactly as they were. It seems to me impossible that that should be deliberately done by business men: they would be practically certain to try to make some arrangement as to the adjustment of their rights."<sup>1</sup>

But the law had been affirmed in the *French Marine Case*.<sup>2</sup>

In *The Fibrosa Case*, twenty years on, Lord Atkin was to hold

<sup>1</sup> 10 Ll. L. Rep., at 217. The Law Revision Committee refer to this judgment: Cmd. 3009. See also Viscount Simon's reference in *The Fibrosa Case* [1943] A.C. 45.

<sup>2</sup> [1921] 2 A.C. 494. And see *per* Lord Parmoor, *ib.*, 523: "The courts will decline to construct a hypothetical contract by suggesting terms which were not within the intention of the parties when the contract was entered into."

that, upon frustration, part payment of the price was recoverable if the buyer had received nothing in return.<sup>1</sup>

### E. CANTIARE CASE: "UNEARNED AGGRANDISEMENT"

"Thus the rule, admitted to be arbitrary, is adopted because of the difficulty, nay, the apparent impossibility, of reaching a solution of perfection. Therefore, leave things alone; *potior est conditio possidentis*. That maxim works well enough among tricksters, gamblers, and thieves; let it be applied to circumstances of supervenient mishap arising from causes outside the volition of the parties: under this application innocent losses may and must be endured by the one party, and unearned aggrandisement may and must be secured at his expense to the other party. That is part of the law of England. I am not able to affirm that this is any part, or ever was any part of the law of Scotland": *The Cantiare Case*, per Lord Shaw.<sup>2</sup>

This withering criticism, in the highest tribunal, of the rule in *Chandler v. Webster*,<sup>3</sup> was voiced—in language less picturesque—by Lord Wright.<sup>4</sup> In the law of Scotland, the law of the Continent and American law, a different rule prevails<sup>5</sup>; the *Law Revision Committee* recommended a radical alteration.<sup>6</sup>

In 1942, in *The Fibrosa Case*,<sup>7</sup> a very strong House rolled away the reproach. Lord Macmillan began his oration:

"My Lords, speaking in 1923 of the so-called coronation cases, Lord Shaw ventured on prophecy. 'No doubt,' he said, 'the occasion will arise when that chapter of the law will have to be considered in this House,' for, as the Earl of Birkenhead had pointedly observed, 'none of them' [the 'coronation cases'] 'is binding upon your lordships'<sup>8</sup> . . . The mills of the law grind slowly. . . . now at length in the present appeal the occasion foretold has arisen, and I may be permitted to express my gratification that it has been employed to clear the law of England by the unanimous judgment which the House is to-day pronouncing from the reproach to which it was exposed so long as the law laid down in *Chandler v. Webster*,<sup>3</sup> held the field."<sup>8</sup>

<sup>1</sup> [1943] A.C. 32, 55; Chap. XXIV.

<sup>2</sup> *Cantiare San Rocco, S.A. v. Clyde Shipbuilding and Engineering Company, Ltd.* [1924] A.C. 226, 259, reversing the decision of the First Division of the Court of Session (diss., Lord Mackenzie), who had recalled the interlocutor of Lord Hunter: [1922] S.C. 723. (The name is there spelled "*Cantiere*.")

<sup>3</sup> [1904] 1 K.B. 493; *supra*, 596, 598.

<sup>4</sup> *Legal Essays and Addresses*, 257, 258, 359, 360. "Scots law has adopted a different and it seems a juster rule . . ."

<sup>5</sup> See (1939), Cmd. 6009, Appendix A.

<sup>6</sup> Seventh Interim Report, rule in *Chandler v. Webster* (1939), Cmd. 6009.

<sup>7</sup> [1943] A.C. 32; *infra*, 627.

<sup>8</sup> *Ib.*, at 57, 58; *infra*, 641.

## I. THE FACTS

By a contract made in May, 1914, a shipbuilding company in Glasgow agreed to supply f.o.b. at Port Glasgow, to a shipbuilding company in Trieste, a set of marine engines. The whole of the work in hand from time to time under the agreement was to become the *absolute property of the purchasers*, subject to any lien for unpaid purchase-money. The engines were to be completed and delivered at Port Glasgow by April, 1915. In consideration of the supply of the engines in accordance with the agreement and the specification, the purchase price was £11,550, payable by five specified instalments; £2,310, being 20 per cent., the *first instalment*, payable on signing the contract, was duly paid. On 12th August, 1914, Great Britain declared war on Austria (of which Trieste was then part); further performance of the contract became impossible. Beyond the making of plans and the ordering of material, no work had as yet been put in hand. After the end of the war, the *Cantiare* company—which had become an Italian company—sued the Glasgow company for a declaration that upon the outbreak of war the contract had been abrogated, and for repayment of £2,310 on the ground of failure of consideration.

## II. IN COURT OF SESSION

1. *Lord Hunter's Judgment*

Before Lord Hunter (Lord Ordinary) it was submitted that upon 12th August, 1914, the pursuers became alien enemies, and that the contract became "*eo ipso* abrogated and avoided and dissolved on that date."<sup>1</sup> The pursuers pleaded that they were entitled to repetition of the instalment. The defenders submitted that since they had duly proceeded with the work and the pursuers had received and accepted services in terms of the contract and *restitutio in integrum* was impossible, they were entitled to retain the payment.

Lord Hunter ordered repayment, subject to such counterclaim as might be afterwards established. Payment was made upon the footing that the engines would be delivered. Delivery becoming impossible, the consideration for which the payment was made, failed and a claim for repayment arose, "giving the defenders, it may be, a right to a deduction in respect of work done or outlays incurred by them."<sup>2</sup>

2. *Reversed by First Division*

The defenders reclaimed. They argued that the contract was not abrogated *ab initio*: further performance was frustrated

<sup>1</sup> From narrative of facts: [1922] S.C., at 724.

<sup>2</sup> *Ib.*, at 726, citing Ersk. III, i, 10, at 727 and *Watson & Co. v. Shankland* (1871), 10 Macph. 142, 152, from the judgment of Lord President Inglis (affirmed 11 Macph. (H.L.) 51); *Stair Inst.* I, vii 7: "... if the cause cease by which they become ours, there superveneth the obligation of restitution of them."

and, though the right to sue was suspended, the rights of the parties were preserved. The purchaser was not entitled to repayment of money paid as price.<sup>1</sup> For the respondents it was submitted that the periodic payments were instalments of the total price and that the consideration having failed, the defenders were not entitled to retain the instalments. Scots law recognised "restitution as an equitable remedy collateral to the contract and enforceable by the courts, unless the contract contained a term inconsistent with it."<sup>2</sup> Construction had not begun and no part of the property had passed. Under the Sale of Goods Act, 1893, the buyer of specific future goods (including goods under instalment contracts) was not liable for the price until the property had passed.<sup>3</sup>

The First Division (by a majority) reversed the judgment.

Lord President Clyde said that, upon the outbreak of war, the contract became illegal of further performance, but accrued rights remained unaffected save that during the war the right to sue was suspended. The condition of repayment was that the contract had been *rescinded*, i.e., *wholly annulled*.<sup>4</sup> Lord Skerrington pointed out that the buyers would receive consideration for the first instalment: "They acquired an immediate right to the services mentioned in Article 6 of the contract," exchange of plans, etc., "and a contingent right to the property of any part of the work which the sellers might from time to time have in hand."<sup>5</sup>

### 3. Lord Mackenzie's Dissent

In a very clear opinion, Lord Mackenzie dissented. There was "failure of consideration upon which the pursuers paid the defenders the sum of £2,310."<sup>6</sup> This was not an action *on the contract*, but a *claim for restitution*; "and unless the contract contains express terms to the contrary, the law of Scotland will give the remedy asked."<sup>6</sup>

The payment was "an advance of a portion of the contract price"—"in consideration of the said contractors supplying." The defenders' argument involved that "whenever the ink was dry on the contract there accrued to them an indefeasible right to a payment of £2,310. Their argument admittedly implies that, even if the payment had not been made before the declaration of war, they would have had an accrued right to sue the purchasers for this sum on the declaration of peace, though

<sup>1</sup> [1922] S.C., at 728, 729.

<sup>2</sup> *Ib.*, citing Stair Inst. I, vii, 7; Bell, *Principles* (10th ed.), s. 530; Glog on Contract, 70-72, 638, 641.

<sup>3</sup> Sections 1 (3); 5 (3); 10 (1); 20; 62 (1).

<sup>4</sup> [1922] S.C., at 731.

<sup>5</sup> *Ib.*, at 739, 740.

<sup>6</sup> *Ib.*, at 735. See *Watson & Co. v. Shankland*, 10 Macph. 142, 152.

by the dissolution of the contract they were discharged from all further performance of the contract."<sup>1</sup>

*The Cantiare Company* appealed to the House of Lords.

### III. IN HOUSE OF LORDS

#### 1. *The Argument*

The appellants based their claim on the principle of restitution founded on the Roman maxim: *nemo debet locupletior fieri damno alieno*. It was argued that in Scotland the law of restitution upon failure of consideration had been uniformly applied.<sup>2</sup> Thus, on a master's death during an apprenticeship, the apprentice has been held entitled to recover a proportion of the premium; in England this rule would not apply.<sup>3</sup> "By the law of Scotland the problem of the *Coronation Cases* is solved by the doctrine of restitution."<sup>4</sup>

For the shipbuilders it was submitted that the court would "decline to construct a hypothetical contract by suggesting terms which were not within the intention of the parties when the contract was entered into."<sup>5</sup> Where, upon an unforeseen occurrence, the contract is dissolved, the loss lies where it falls: neither party can claim against the other. In this case, the balance was against the *Cantiare* company; it might have been the other way, for the Glasgow company might have done a good deal of work and have been paid nothing. No total failure of consideration had occurred; "there had been actings of both parties up to a certain stage."<sup>6</sup>

The House of Lords held that by the law of Scotland, the rule of restitution applied to a contract abrogated by war; the

<sup>1</sup> [1922] S.C., at 736.

<sup>2</sup> The authorities in Roman and Scots law are cited [1924] A.C. 226, at 228.

<sup>3</sup> The authorities are cited *ib.*, at 228.

<sup>4</sup> [1924] A.C., at 230, referring to *Sinclair v. Brougham* [1914] A.C. 398, 431-435. Lord Dunedin speaks of that "super-eminent equity" of restitution in Roman Law, in a case where there was no contract, for example, where a pupil, being totally incapable of contracting, had received an advance (at 434). "Is English equity," he asks, "to retire defeated from the task which other systems of equity have conquered?" (at 435). The problem was the rights of depositors of moneys paid on an *ultra vires* contract of loan. "The importance of the case," declared Lord Wright, "is that it demonstrates a category of claims distinct from contract, or tort, or trust (express or resulting), the essential principle of which is that the defendant should not be unjustly enriched at the expense of the plaintiff. The test of recovery is not the loss to the plaintiff, but the gain to the defendant, though in general the loss fixes a limit. Emphasis is to be placed on the word 'unjustly.'" And again: "The essence of the remedy was not compensation to the plaintiff, but the restitution by the defendant of what would be, if not restored, an unjust enrichment": *Legal Essays and Addresses*, 2, 3, 11. See *Address on Sinclair v. Brougham*, 1-33, for the basis of "unjust enrichment."

<sup>5</sup> [1921] 2 A.C., 494, 523; *per* Lord Parmoor in *The French Marine Case*.

<sup>6</sup> [1924] A.C., at 231.

*Cantiare* company was entitled, on the ground of failure of consideration, to repayment of the instalment, subject to such counter-claim as might later be established for work done.

## 2. *Earl of Birkenhead : Restitution*

The Earl of Birkenhead pointed out that the question was as to the law of *Scotland* ; he would say nothing to fetter opinion if the *Coronation Cases* were reviewed by the House, for none was binding upon the House.<sup>1</sup> Payment was made in consideration of the supply of engines. The engines were never made and never supplied and the contract was terminated without the fault of either party. The *Cantiare* company had got nothing in return for the payment of this money. The consideration was entire ; the instalments were merely payments on account, not allocated to any particular stage of the work. If the shipbuilders were right and if the *whole* price had been paid, they would be entitled to keep the price of machinery which they had not supplied and never would supply.<sup>1</sup> By *Roman law*—upon which the Scottish law on this subject rests<sup>2</sup> :

" A person who had given to another any money or other property for a purpose which had failed could recover what he had given, unless there had been no fault on the recipient's part, and he had not been enriched thereby. If the recipient had been enriched, then he would, if the purpose failed, and he retained the property, be acting unjustly, and consequently he was under an obligation to return it. It was open to him to show, not merely that he had not been enriched at all, but also, if such were the fact, that though enriched he had not benefited to the full value of the property. Such would be the case if the property had been lost or damaged without blame attaching to him."<sup>3</sup>

A passage in Bell's *Principles of the Law of Scotland*,<sup>4</sup> succinctly states the *Scottish* law :—

" One who by mistake has received anything (as from a carrier) is liable to restitution ; and so one to whom a thing

<sup>1</sup> [1924] A.C., at 232.

<sup>2</sup> *Ib.*, at 244, *per* Lord Dunedin.

<sup>3</sup> *Ib.*, at 235. The authorities are cited at 234. The remedy—it was here stated—was by way of *condictio* ; the underlying principle was " that a person had received from another some property, and that by reason of circumstances existing at the time, or arising afterwards, it was or became contrary to honesty and fair dealing for the recipient to retain it." In the present kind of case the particular form was *condictio causa data causa non secuta*, " Action to recover something given for a consideration which has failed." (Digest, bk. XII, tit. iv ; see also Digest, bk. XII, tit. vii.)

See Buckland, *Causa and Frustration in Roman and Common Law* (1932), 46 Harv. L. Rev., 1281–1300, criticising these statements of Roman law ; *infra* 616, note 3.

<sup>4</sup> Section 530 ; cited [1924] A.C., at 236, 255. The *locus classicus* is Lord Stair's Inst. bk. I, tit. vii, para. 7, cited *ib.*, at 235, 236. Next comes Bankton, bk. I, tit. viii, p. 15, and then, Erskine's Institutes, III, i, 10.

has been transferred, or an obligation undertaken and fulfilled, on a consideration which has failed, is also liable to restitution under the condition, *causa data causa non secuta*.”

A passage was also cited from a celebrated judgment of Lord President Inglis—which has been “universally looked upon since its date as expressing the law of Scotland.”<sup>1</sup> He is discussing the legal principles applicable to affreightment ; they are not “essentially different,” he says, from those applicable to other similar contracts. No rule of the civil law, adopted into all modern codes, was better understood than this,

“that if money is advanced by one party to a mutual contract, on the condition and stipulation that something shall be afterwards paid or performed by the other party, and the latter party fails in performing his part of the contract, the former is entitled to repayment of his advance, on the ground of failure of consideration.”<sup>2</sup>

The remedies, in Scottish practice, he declares, are represented by the action of restitution and the action of repetition.

“And in all systems of jurisprudence there must be similar remedies, for the rule which they are intended to enforce is of universal application in mutual contracts. If a person contract to build me a house, and stipulate that I shall advance him a certain portion of the price before he begins to bring his materials to the ground, or to perform any part of the work, the money so advanced may certainly be recovered back if he never performs any part, or any available part, of his contract. No doubt, if he perform a part and then fail in completing the contract, I shall be bound in equity, to allow him credit to the extent to which I am *lucratus* by his materials and labour, but no further ; and if I am not *lucratus* at all, I shall be entitled to repetition of the whole advance, however great his expenditure and consequent loss may have been.”<sup>2</sup>

This was the first time, said the Earl of Birkenhead, that the issue came for decision how far these principles applied in Scottish law to a contract abrogated by the outbreak of war.

On principle the same result should follow as followed from any other act or event beyond the control of the parties, when neither party was in fault.<sup>3</sup>

### 3. Viscount Finlay : between English and Scots Law

The appellants would not dispute, said Viscount Finlay,

<sup>1</sup> [1924] A.C., at 246, *per* Lord Dunedin. Thus also Lord Shaw, at 256.

<sup>2</sup> Cited *ib*, 237, 238, from *Watson & Co. v. Shankland* (1871), 10 M. 142, 152; affirmed (1873), L.R., 2 H.L. So. 304 ; 11 M. (H.L.) 51. See Lord Atkin's criticism in *The Fibrosa Case* [1943] A.C. 32, 54 ; *infra*, 639, note 2. And see *The Denny Mott Case* [1944] A.C. 265, at 271, *per* Lord Thankerton ; at 273, *per* Lord Macmillan ; at 281, *per* Lord Wright ; *supra*, 518.

<sup>3</sup> [1924] A.C., at 238.



that by the law of England the shipbuilders would have been entitled to keep the money. The principle of English law was stated by Collins, M.R., in *Chandler v. Webster*,<sup>1</sup> and had been "restated with great clearness" by Lord Parmoor in *The French Marine Case*.<sup>2</sup> That statement was no part of the judgment of the House, but the principle had been repeatedly acted on in the Court of Appeal.<sup>3</sup> The question in the present case, however, was as to the law of Scotland. Upon the authorities of the Scottish jurists and of the *Digest*, the doctrine of English law as expounded in the Court of Appeal was at variance with the law of Scotland.<sup>4</sup>

#### 4. Lord Dunedin: Claim not founded on the Contract

Lord Dunedin puts the point with unique economy:—

"The appellants paid £2,310 in order to get engines. They did not get the engines; therefore, they ask for the £2,310 back. It is not breach of contract. If it were they would be entitled not only to the £2,310 but to damages as well. It is a claim which arises in connection with the contract but is not founded upon the contract."<sup>5</sup>

According to the Scottish law, the house-owner in *Chandler v. Webster*,<sup>6</sup> would have had to return the £100 and would have failed to recover £41, the balance of the price of seats for which he had sued. "... *Chandler v. Webster*,<sup>6</sup> if it had been tried in Scotland, would have been decided the other way."<sup>7</sup>

"I cannot help thinking," Lord Dunedin declared, "that the angle of view, if I may so phrase it, from which an English and a Scottish judge would look at such a question is different, and that the cause is to be sought in the reluctance of the English law to order the repayment of money once paid."<sup>8</sup>

Referring to the limits of the action for money had and received, which Lord Sumner indicated in *Sinclair v. Brougham*,<sup>9</sup>

<sup>1</sup> [1904] 1 K.B. 493, 499, 501

<sup>2</sup> [1921] 2 A.C. 494, 523; *supra*, 605.

<sup>3</sup> [1924] A.C., at 241

<sup>4</sup> *Ib.*, at 243

<sup>5</sup> *Ib.*, at 247.

<sup>6</sup> [1904] 1 K.B. 493.

<sup>7</sup> [1924] A.C., at 248.

<sup>8</sup> *Ib.*, at 248. See Lord Macmillan's Rede Lecture, "*Two Ways of Thinking*," in "*Law and Other Things*" (1937), 76-102, contrasting the predilection of the Scottish mind for the system of code law and the predilection of the English mind for the system of case law.

"In Scotland it is treated as a case of unjust enrichment; in England it is treated as a case of an accrued right." *Legal Essays and Addresses*, 380. See also 259, 260.

<sup>9</sup> [1914] A.C. 398, 451-460. Lord Sumner stated that the action for money had and received cannot be extended beyond the principles illustrated in the decided cases (at 453). That action was a form of *assumpsit*, "already old in Lord Mansfield's time" (at 454). It was a "liberal" action "in that it was attended by a minimum of formality, and was elastic and readily capable of being adapted to new circumstances." *Marriott v. Hampton* (1797), 7 Term Rep. 260;

he contrasts the approach in systems founded upon Roman law, indicated in his own speech in that case.<sup>1</sup>

It had been argued that when, owing to war, a contract had been rendered impossible of performance, "accrued rights" remain. But what is an "accrued right?" Lord Dunedin asks. This does not simply mean "all that may have happened."

"And that brings me to the very short point on which, in my view, the whole case turns. Was the £2,310 paid in respect of the signing of the contract? If it were, then it cannot be said that there was a *causa non secuta* . . . But it is not so. It is to be paid on signing the contract. It had, indeed, no separate existence. It is only an instalment of the total price which is the consideration for the whole engine. There is no splitting of the consideration."<sup>2</sup>

There was no passing of the property; there never was a property to pass. *Restitutio in integrum* did not enter into the question: "That is the price for being allowed to set aside a contract. Here . . . the contract is left standing; the doctrine of repetition works independently of it."<sup>2</sup>

#### 5. Lord Shaw of Dunfermline: Prevention of Undue Enrichment

Lord Shaw<sup>3</sup> traces the origin of the doctrine of restitution.<sup>4</sup>

"What is to become of the £2,310," he asks, "which was given for something, but for which nothing was got in return?"

Is it to remain in the pockets of the builders who built nothing, or is it to be given back to the purchasers who got nothing?"<sup>5</sup>

Smith, *Leading Cases* (13th ed.), vol. 2, 386, illustrates the proposition that money is not thus recoverable in all cases where it is unconscientious for the defendant to retain it, for no one can doubt that Hampton's retention of the money in that case was very much like sharp practice" ([1914] A.C., at 455). Upon a review of the cases, Lord Sumner concluded "There is now no ground left for suggesting as a recognisable 'equity' the right to recover money *in personam* merely because it would be the right and fair thing that it should be refunded to the payer" (at 456).

<sup>1</sup> [1914] A.C. 308, at 427-439. Of the speeches in *Sinclair v. Brougham*, Lord Wright has told us that those of Lord Parker and Lord Dunedin he found "most illuminating. They contain references more or less complete to almost every main principle of unjust enrichment or restitution . . ." (*Legal Essays and Addresses*, 6). Lord Dunedin says: "Now I think it is clear that all ideas of natural justice are against allowing A to keep the property of B, which has somehow got into A's possession without any intention on the part of B to make a gift to A" ([1914] A.C., at 431). In the case of a chattel, there would be an action for restitution. In the case of money lay the action for money had and received, "an equitable doctrine under a legal form," using the word "equitable" in a non-technical sense (at 431). Where, however, money is received under an *ultra vires* contract to repay, the action for money had and received did not lie: a "fictional contract" could not be binding in circumstances in which a real contract was not binding (at 433, 434).

<sup>2</sup> [1924] A.C., at 249.

<sup>3</sup> *Ib.*, 249-261.

<sup>4</sup> "With great precision and accuracy," *ib.*, 244, *per* Lord Dunedin.

<sup>5</sup> *Ib.*, at 250.

This is "a plain and typical case of restitution"; the *res*—in respect of which alone part payment was made—never existed. The consideration had entirely failed; by Roman law and the maxim *causa data causa non secuta*, restitution would have applied.

He quotes the exposition by a great scholar :—

"1. *Condictio ob rem dati, re non secuta*, i.e., a condictio for something handed over for a purpose which has failed, e.g., for the emancipation of a son, or manumission of a slave, or for securing a dowry, or settlement of a law suit, or as a condition of acceptance of a legacy or inheritance. If the son or slave is not freed, or the marriage does not take place, or the suit is pressed on, or the inheritance is not accepted, or the will is upset, the money or other property passed can be recovered, as a rule, subject to exception in cases where there is no fault on the recipient's part, and he has not, in fact, been enriched by the transfer."<sup>1</sup>

The prevention of "undue enrichment"—that is the basis of the doctrine: "enrichment by reason of the thing being received and the consideration and return failing." The basis is "simply honesty."<sup>2</sup> If the consideration given has failed, it is "just the same as if the thing was given *sine causa* altogether, and restitution must take place."<sup>3</sup>

<sup>1</sup> Cited in [1924] A.C., at 252. Roby, *Roman Private Law*, bk. V, ch. 3.

The name is taken from Celsus and Paul, and is identified with the rubric of Digest XII, 4, where it is called "*Condictio causa data causa non secuta*," a phrase not found elsewhere—Lord Shaw is quoting Roby—and difficult to explain.

<sup>2</sup> *Ib.*, at 253. See *Legal Essays and Addresses*, 15, 21, 26, 403, 404.

<sup>3</sup> *Ib.*, citing Africanus Digest XII, tit. vii, 4: "*Nihil refert, utrumne ab initio sine causa quid datum sit an causa, propter quam datum sit, secuta non sit.*"

1. Buckland, in *Causas and Frustration in Roman and Common Law* (1932), 46 Harv. L. Rev., 1281-1300, critically examines the excursions of the House of Lords into Roman law. The Romans, he says, called supervening impossibility *casus* and its effect was not always the same. "The Roman Law of the Romans," he points out, unlike "the various types of modern Roman Law," had two systems of contractual obligation; the remedies of the more ancient system (where obligations were unilateral), were *stricti juris*, e.g., a *stipulatio* imposed on one party only, the promisor; the remedies of the later system (where obligations were bilateral, e.g., as in most business relations) were *bonae fidei iudicia*. . . If one party were released by *casus*, the other would still be bound. "The release was of the party, no less and no more" (at 1281). Buckland thinks that upon release by *casus*, "retention was the original rule for *stricti juris* obligations, the other being equitable relaxation, only sporadically applied especially in non-commercial cases" (at 1283). The decision in the *Cantiare Case* was "no doubt good Scots law, as well as good sense" (at 1284). But the law of *condictio* he says, was stated not as it appears in Roman law, but as it is found in the treatises on Scots Law and in the works of the Pandectisten. *Condictio causa data causa non secuta* (called by Buckland *condictio ob rem dati*) was a "*stricti juris* remedy for certain cases which did not come into the field of any recognised contract. It was a means of undoing what had been done when there was no better remedy" (*ib.*). Now the *Cantiare Case* involved a transaction of sale—a *bonae fidei* transaction;

the buyer could recover in the circumstances what he had paid in advance, not because of a *condictio*, but by reason of the nature of *bona fides* which may be "roughly described as behaving as, in the given circumstances, a gentleman would behave" (at 1286).

*Casus* is *unilateral*; if both parties are relieved, that is "only where *casus* makes both performances impossible."

"That the other party is also released in most *bonae fidei* contracts rests not upon release by *casus* but on the very different principle that, *ex fide bona*, a party ought not to be called upon to pay for a service he has not had."

Buckland next examines *Taylor v. Caldwell* (1863), 3 B. & S. 826, and finds Blackburn, J.'s release of both parties, "a little surprising" (*ib.*, at 1288). Although the decision in *Krell v. Henry* [1903] 2 K.B. 740 was "perfectly sound," it transformed the rule in *Stubbs v. Holynell* (1867), L.R. 2 Ex. 311—"that in a divisible contract work done must be paid for"—into the rule that "in a divisible contract subsequent impossibility does not affect rights already acquired."

In *Krell v. Henry*, also, Roman law was involved; but the authority was Pothier, who differs from the Roman law and the Pandectists. In *Obligations* (1802), "he laid it down that *casus* released both parties absolutely. For Roman law that is misleading, at least if applied to mutual undertakings. It is not true for sale, and if the rules of hire give, at first sight, something like that result, this is due not to any doctrine of *casus*, but to the notion of *bona fides* . . . The court properly rejected his limitation of *casus* to obliteration of *certum corpus*, which is not at all Roman. But the fact that both parties were released from further performance was not, for the Romans, any reason for failing to refund what had proved not to be due; quite the contrary" (at 1204).

Concerning *Chandler v. Webster* [1904] 1 K.B. 493, 495, Buckland observes:—

"The two propositions, that further performance cannot be claimed and that rights which have already accrued will not be disturbed, appear to be in fact inconsistent. If payment of the money is not further performance, it can hardly be performance at all, for it certainly is not performance already made; if it is not performance at all, it is difficult to see on what ground it can possibly be performed. . . . There is nothing inevitable about the non-returnability of the money" (*ib.*, at 1295).

The real reason for the decision was to do "rough justice": "But it is very rough justice indeed" (at 1296). This was, in effect, "the harsh rule of the *condictio*," abandoned in modern Roman law and never applicable to hire.

2. See also *Buckland and McNair, Roman Law and Common Law* (1936), *Impossibility*, 171–184, *Casus and Frustration*, 184–186.

"The *casus* involves release of the party and no more, and it seems that the other party would still be bound . . ." (at 180).

The *condictio* was a remedy for "unjustified enrichment," primarily applicable to money paid by mistake (*ib.*). Many bargains were not legally enforceable. If one party had handed over his contribution, that he could not "compel the counter-render constituted a grave injustice" (at 181). "The civil law provided a *condictio ob rem dati* by which he could recover what he had paid. In the *corpus juris* retention was the rule,

"at any rate where the case has a commercial aspect. In the modern Roman law it has disappeared. There is only one system of contract and any agreement normally makes a contract. Thus the real field of *condictio ob rem dati* no longer exists and *bonae fidei* notions have practically ousted those of *strictum jus*."

If the transaction comes within *bonae fidei* contracts, different considerations apply and *condictio* is irrelevant. In Roman law, under a contract of hire, if, without fault of the hirer the service hired was not rendered the hirer was not liable for what he had not received and could recover what he had paid in advance. In the *actio ex conducto*, the *iudex*, under the words *ex bona fide*, could condemn for "what in all the circumstances is fair; the formula was gone in the time of the *corpus juris*, but the principle remained" (at 186).

This, said Lord Shaw, is "plainly" the interpretation adopted by the law of Scotland for centuries.<sup>1</sup> Moreover, for over half a century, the law had stood "expounded by unquestioned authority by Lord President Inglis in *Watson & Co. v. Shankland*."<sup>2</sup> The divergence of law between England and Scotland had culminated in "the *Coronation Cases*."

"No doubt the occasion will arise when that chapter of English law will have to be considered in this House."<sup>3</sup>

Lord Shaw put a "simple illustration" to make the divergence clear. Suppose that the whole purchase price, £11,500, had been *paid* at the signing of the contract, the same result would follow: *in the present state of English law* the builder would retain "the whole price of an article which he never supplied and never would supply." It was not surprising that "there has been in high legal quarters a feeling both of uneasiness and disrelish as to the English rule."

"No doubt"<sup>4</sup> he adds, "the adjustment of rights after the occurrence of disturbances, interruptions or calamities is in many cases a difficult task. But the law of Scotland does not throw up its hands in despair and leave the task alone."

"The maxim just quoted [*sc. potior est conditio possidentis*] found no place in the law of Scotland except in quite another connection—namely, where there is a *turpis causa*. Under that law, restitution against calamity or mischance which produces a failure of consideration is one thing that the law must and will do its best to accomplish . . ."<sup>5</sup>

"But restitution there ought to be here, simply and shortly because there is no *turpis causa*. In such a case the innocent must be restored against loss, and the unearned aggrandisement must be yielded up."<sup>6</sup>

<sup>1</sup> [1924] A.C., at 254, citing Stair Inst. I, vii, 6; Bankton; "every deed or grant that depends upon mutual consideration, not given or performed, must be restored to the granters"; Erskine III, i, 10: "Under this class may also be reckoned those obligations which arise from the natural duty of restitution. In consequence of this, whatever comes into our power or possession which belongs to another, without an intention in the owner of making a present of it, ought to be restored to him . . .": Bell, *Principles*, s. 530.

<sup>2</sup> (1871), 10 M. 142, 152; cited at [1924] A.C., at 256, 257.

<sup>3</sup> [1924] A.C., at 257, 258.

<sup>4</sup> *Ib.*, at 258.

<sup>5</sup> *Ib.*, at 259, 260.

<sup>6</sup> *Ib.*, at 260.

In *Dies v. British & International Mining and Finance Corporation* [1939] 1 K.B. 724, the defendants contracted to sell to one Q certain rifles and ammunition for £270,000. If, from any cause independent of the volition of the vendors, performance was rendered impossible, the vendors would refund all payments, except £13,500 by way of liquidated damages or "compensation fixed beforehand" for their expenses and trouble. The purchaser paid £100,000, but in admitted breach of contract, neither completed payment, nor took delivery. The vendors

elected to treat the contract as at an end. The purchaser and his assignee sued for £100,000, less £13,500. Stable, J., held that the clause referred to frustration only, not to breach of contract, that the £100,000 was part payment; and that the purchaser was entitled to recover the £100,000, subject to the defendant's claim to damages for breach of contract. The object of the clause was to provide that, in the event of frustration, "they were not to be placed in the position to which the English law relegates them" (at 736). No frustration supervening, the plaintiffs could not recover on the express term. Nor could any implied term be written into the contract.

## CHAPTER XXIII

### RESTITUTION : A RECOMMENDATION

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#### REPORT OF LAW REVISION COMMITTEE

ON 3rd May, 1937, the following subject was referred by Lord Maugham, L.C., to the Law Revision Committee :—

"Whether and, if so, in what respect, the rule laid down or applied in *Chandler v. Webster* [1904] 1 K.B. 493, requires modification, and in particular to consider the observations made thereon in *Cantiare San Rocco, S.A. v. Clyde Shipbuilding and Engineering Co., Ltd.* [1924] A.C. 226, by Lords Dunedin and Shaw, at 247, 248 and 259."<sup>1</sup>

In May, 1939, the *Seventh Interim Report* was presented.<sup>2</sup> After a severe criticism of the rule, and a consideration of four possible solutions, the committee recommended a change

<sup>1</sup> The function of this Standing Committee, appointed in 1934, by Viscount Sankey (then Lord Chancellor) was :—

"to consider how far, having regard to the Statute Law and to judicial decisions, such legal maxims and doctrines as the Lord Chancellor may from time to time refer to the Committee require revision in modern conditions."

Lord Wright is chairman. Its fifteen members represent Bench and Bar and Public Teachers of Law, and include Lord Porter and Lord Goddard, Professors Goodhart, Gutteridge and Winfield, and Sir Arnold McNair.

<sup>2</sup> (1939), Cmd. 6009.

in the law and suggested certain rules of repayment upon the occurrence of a frustrating event, unless a contrary intention appeared from the terms of the contract.

The reasoning and the argument of this report prepared the ground for *The Fibrosa Case* and the Law Reform (Frustrated Contracts) Act, 1943. To this decision and the subsequent statute the report remains an illuminating introduction.

### 1. Rule in *Chandler v. Webster*

The rule was that—

"after a frustrating event the loss 'lies where it falls.' That rule means that sums paid or rights accrued before that event are not to be surrendered, but that all obligations falling due for performance after that event are excused. The guillotine falls with faultless precision, but often with ruthless effect."<sup>1</sup> The rule had been criticised both by judges<sup>2</sup> and by the text-book writers.<sup>3</sup>

The court "remakes" the contract :

"The doctrine is modern and is no part of the old common law, which would not have treated impossibility as an excuse for failure to perform a contract. As Lord Atkin pointed out, the action of the court in truth falls into two parts in remaking the contract of the parties. It not only holds that the contract is at an end and that further performance is excused, but it also says that moneys paid shall remain as they are. On any view it is making a new contract."<sup>4</sup> But the rule is "very rough justice indeed."<sup>5</sup>

<sup>1</sup> (1939), Cmd. 6009, at 3.

<sup>2</sup> See *The Cantiani Case* [1924] A.C., 226, 248, per Lord Dunedin; at 258, per Lord Shaw; *The Stathatos Case* (1917), 33 T.L.R. 390, 392, per Atkin, J.; *Russkoe v. Stirk* (1922), 10 Ll. L. Rep. 214, 217, per Atkin, L.J.

<sup>3</sup> Pollock, *Contract*, 10th ed., 297, Note: "*Chandler v. Webster* . . . which would have been decided the other way in Scotland certainly did not produce a reasonable result."

<sup>4</sup> (1939), Cmd. 6009, at 4.

"The court is in this sense making a contract for the parties—though it is almost blasphemy to say so": *Legal Essays and Addresses*, 259.

<sup>5</sup> Buckland, *Cases and Frustration in Roman and Common Law* (1932), 46 Harv. L. Rev. 1281-1300, at 1296. "The real reason for the decision is quite different. It is intended to do rough justice, as Collins, M.R., called it. The other view, as Lord Alverstone had already said in *Blakeley v. Muller* [1903] 2 K.B. 760, seemed unfair. The other party may have incurred expenses. He is to keep and claim the money because he may have incurred expense; he is to recover the whole of the agreed price without rendering any of the service, though in many cases he will have incurred no real expense; and in any event, the expense incurred will usually bear no real relation to the hire paid or promised . . . In cases of hire, the Roman law, where no performance had been possible, gave recovery and barred claims for future payments; where there had been performance, the right of recovery was made to turn, not on the date at which the payment was due, which seems arbitrary, but on the extent to which the service had been rendered, which was the decision in *Stubbs v. Holywell Railway Company* (1867), L.R. 2 Ex. 311."

"Why should it" [sc. the court], continues the report, "stop where it does and make an unreasonable contract, which it cannot fairly be said that the parties as reasonable men would have made for themselves if they had actually provided for the unanticipated event? If they had provided for dissolution of the contract, would they not also have provided for some conditions on which dissolution should take place, such as repayment in whole or in part?"

## 2. The Reasoning Examined

Upon three grounds the plaintiff in *Chandler v. Webster*,<sup>1</sup> it was held, could not recover:—

(i) No total failure of consideration had occurred; the effect of supervening impossibility is merely to release the parties from *further performance* of the contract, not to rescind the contract *ab initio*.<sup>2</sup>

(ii) *Taylor v. Caldwell*<sup>4</sup> and *Appleby v. Myers*<sup>5</sup> precluded recovery. The Committee rightly point out that the question before the court in those cases was not whether the promisor must return a benefit received from the promisee, but simply whether the promisor was excused from performance, or (as the case might be), from further performance of his contract.<sup>6</sup> The two questions are "entirely distinct," and must be kept "rigidly separate." A reversal of the rule in *Chandler v. Webster*,<sup>7</sup> would not be "a radical innovation, or in conflict with well-settled common law principles."<sup>8</sup>

(iii) The "dominant reason" for the decision was "that the court will not unply any terms beyond the mere dissolution of the contract."<sup>9</sup> Collins, M.R., admitted that the rule "adopted by the courts" was "to some extent an arbitrary one," but it was "really impossible in such cases to work out with certainty" the rights of the parties.<sup>9</sup> Wills, J., had declared that "the process of constructing a hypothetical contract" was "very unsatisfactory" and "very difficult"; the plaintiffs might have stipulated for a

<sup>1</sup> Cmd. 6009, at 4. See *The Russloe Case* (1922), 10 Ll. L. Rep. 214, 217.

<sup>2</sup> [1904] 1 K.B. 493; *supra*, 596–598.

<sup>3</sup> *Ib.*, per Collins, M.R., at 499. See *Whincup v. Hughes* (1871), L.R. 6 C.P. 78, 85, per Montague Smith, J. And see per Brett, J., at 86: "Where a sum of money has been paid for an entire consideration, and there is only a partial failure of consideration, neither the whole nor any part of such sum can be recovered."

<sup>4</sup> (1863), 2 B. & S. 826; *supra*, 459.

<sup>5</sup> (1867), L.R. 2 C.P. 651; *supra*, 460, note 3.

<sup>6</sup> Channell, J., admits this ([1903] 2 K.B., at 762). He compares advance freight which is not recoverable where the ship or goods have been lost, and the freight is not earned. But this is anomalous, and is not found in the law of other countries (see Cmd. 6009, Appendix B). See Buckland, 46 Harv. L. Rev., 1287.

<sup>7</sup> [1904] 1 K.B. 493, *supra*, 596.

<sup>8</sup> Cmd. 6009, at 5.

<sup>9</sup> [1904] 1 K.B., at 499; *supra*, 597.



return of their money, the defendants for compensation for their outlay : but the result of their bargaining could not be accurately forecast.<sup>1</sup>

### 3. The Problem

Was the problem insoluble ?

"Would it be difficult for the court, when implying a hypothetical term that the contract should be dissolved, to go on and to imply also another equally hypothetical term ?"<sup>2</sup> That the court will "hesitate to construct a contract for the parties" is true. But—

"under certain circumstances, it is necessary in the interests of justice to imply a term which was not in the contemplation of the parties."<sup>2</sup>

By way of illustration, "the doctrine of impossibility of performance itself" is cited, which applies only where the parties "did not themselves have the event in contemplation."<sup>2</sup>

"Having implied the term relating to impossibility, it is not a radical step to imply a further hypothetical term that unearned benefits should be returned under these circumstances."<sup>3</sup>

Such, indeed, is the rule in Scotland,<sup>4</sup> in the United States,<sup>5</sup> and in the Civil Law countries.<sup>6</sup>

<sup>1</sup> In *Blakeley v. Muller* [1903] 2 K.B. 760; *supra*, cited with approval by Collins, M.R., in *Chandler v. Webster* [1904] 1 K.B. 493, 500; *supra*, 594.

<sup>2</sup> Cmd. 6009, at 6, citing Lord Sumner's dictum in the *Hirji Mulji Case* [1926] A.C. 497, 510, upon frustration; *supra*, 509.

<sup>3</sup> Cmd. 6009, at 6.

<sup>4</sup> See Appendix A, recalling Lord Dunedin in the *Cantsare Case* [1924] A.C. 248. And see *The Denny Mott Case* [1944] A.C. 265, at 271, *per* Lord Thankerton; at 273, *per* Lord Macmillan; at 281, *per* Lord Wright.

<sup>5</sup> See Appendix A, quoting *The Restatement*, s. 468, *Rights of Restitution*.

<sup>6</sup> See Appendix A, Head B, *The Law of the Continent*. "The principal Continental systems of law treat the matter as one calling for the application of the doctrine of unjustified benefit." Thus, by Art. 62 of *The Swiss Federal Code of Obligations* "anyone who is unjustly enriched at the expense of another, must return the benefit he has received." In French law, it is laid down by the case law that "it is contrary to natural justice to allow a man to enrich himself at the cost of his neighbour . . . He must either restore what he has received, or pay so much as represents the benefit which he derives from the impoverishment of the other party." The position in Continental law is thus, as follows :—

(a) If A has paid money or handed over property to B and, at the time of frustration, he has received no benefit, B is excused, but must restore to A the money or property.

(b) "A has paid money and B has partly performed his obligation before frustration. A recovers his money less the value to him of B's part performance (unless he restores what he has received). If the benefit is worth more than what he has paid, A must also pay the balance to B. As regards B, he is exonerated from further performance, but he must refund anything received by him in excess of the benefit to A of the part performance. If what B has received is less than the value to A of the part performance, he can claim the balance from A."

By Austrian General Civil Code (in force since 1812), s. 1447 :—

Lord Dunedin had pointed out "the reluctance of the English law to order the repayment of money once paid."<sup>1</sup> A claim for money had and received was permissible only where the contract was void *ab initio* and there was thus a total failure of consideration.<sup>2</sup> Since, at common law, impossibility of performance was no ground for dissolving a contract, there is no precedent for an action to recover the money under these circumstances.<sup>3</sup> But, the committee declare :—

"If the court constructs the hypothetical term providing for dissolution, it is legitimate, and indeed necessary, for the court to institute the attendant term of repayment. The court is depriving the party of his action on the contract and it is a natural corollary to give him a claim proportional for repayment."<sup>4</sup>

#### 4. Four Possible Solutions

The committee considered four possible solutions<sup>5</sup> :—

(i) The payer should be entitled to the *return of all moneys paid to the payee*.

(ii) The payer should be entitled to the repayment of all moneys, *less value of any benefits received under the contract*.

(iii) The payer should be entitled to the repayment of all moneys paid to the payee, "*less one-half of any loss directly incurred by the payee for the purpose of performing the contract*."

(iv) The payer should be entitled to the repayment of all moneys paid to the payee, "*less the amount of any loss directly incurred by the payee for the purpose of performing the contract*."<sup>6</sup> The committee recommended the fourth solution.

#### 5. The Recommendation

The recommendation<sup>7</sup> is in the following terms :—

"The inevitable loss of a chattel rescinds any obligation, even that to compensate its value. This principle is applicable also if performance of an obligation has been frustrated by another incident. The debtor, however, has, in any case, to restore what he has received as consideration, like a *bona fide* possessor, and in such a manner that he does not benefit by the other's loss." (87 Sol. J. 315, letter by Paul Abel.)

<sup>1</sup> [1924] A.C., at 248; *supra*, 614.

<sup>2</sup> This principle was rejected in *The Fibrosa Case* [1943] A.C. 32, as unsupported either in principle or by authority. See Chap. XXIV, *infra*, 635, 637, 647.

<sup>3</sup> The House of Lords found one, in *The Fibrosa Case*; *infra*, 636, 637, 647.

<sup>4</sup> Cmd. 6009, at 6.

<sup>5</sup> *Id.*, at 7.

<sup>6</sup> Author's italics.

<sup>7</sup> Cmd. 6009, at 7, 8.

Logically, this belongs not to the law of contract, but to the law of quasi-contract, "Unjust enrichment," says Lord Wright, "has no relation as a juristic conception with contract at all" *Legal Essays and Addresses*, 15. (And see 21, 26.)

And again: "In contract the relationship arises from consent, whether express or implied in fact, there [is ?] an intention to create that relationship. In tort and is [in ?] quasi-contract there is no intention to create the relationship. It arises by the operation of law on the facts of the case. Thus in quasi-contract the relationship which the law imposes arises from the fact that the defendant

"When performance of a contract has been frustrated in whole or in part,<sup>1</sup> and any money<sup>2</sup> has been paid, or has been agreed to be paid at a time prior to the frustration of the contract, the following rules shall apply unless a contrary intention appears from the terms of the contract<sup>3</sup> :—

(1) Money paid by the one party to the other in pursuance of the contract shall be recoverable,<sup>4</sup> but subject to a deduction of such sum as represents a fair allowance for expenditure incurred by the payee in the performance of or for the purpose of performing the contract.<sup>5</sup> In fixing the amount of such deduction the court shall include an allowance for overhead expenses, but shall also take into account any benefits<sup>6</sup> accruing to the payee by reason of such expenditure,<sup>7</sup> and the amount recovered shall not exceed the total of any money so paid or agreed to be paid under the contract. Loss of profit shall in no case be taken into consideration.<sup>8</sup>

(2) When at the moment of frustration the contract has been performed in part and the part so performed is severable,<sup>9</sup>

has been enriched or advantaged at the expense of the plaintiff under circumstances which made it just that he should make restitution to the plaintiff, so that it is unjust and a wrong to the plaintiff if he fails to do so . . . The obligation really arises from the fact of unjust retention of what should be restored to the plaintiff. That is enough in law to constitute the *nexus*, if that term is to be used, though it is better to reject it altogether and to speak merely of the obligation arising in law from the actual facts": *ib.*, 403, 404.

<sup>1</sup> See *Restatement*, s. 469, *Impossibility in Alternative Contracts*, and Illustrations.

<sup>2</sup> The recommendation was confined to money paid or agreed to be paid. The American rule applies to the whole "value of performance" (*Restatement*, s. 468). Williston points out: "Finally, it should be immaterial whether the plaintiff's claim is based on a transfer by him of money, land, goods, labour and materials, or personal services" (s. 1972). See also s. 1977, *infra*. By the Law Reform (Frustrated Contracts) Act, 1943, s. 1 (3), the value of a "valuable benefit" is recoverable, subject to the specified conditions; *infra*, 680, 703.

<sup>3</sup> See *Restatement*, s. 468 (1) (2), providing restitution "except where a contract clearly provides otherwise." See also s. 288, *Comment b*; s. 456, *Comment c*; s. 457, *Comment b*; and see Williston, s. 1972, *infra*. Under this exception it would not have been open to the defendant to contend that the circumstances in which the contract was made showed that the plaintiff agreed to assume the risk of frustration. Nor would parol evidence have been admissible.

This difficulty is removed by s. 2 (3) of the Act; *infra*, 690.

<sup>4</sup> See Williston, ss. 1969, 1972, *infra*, 699.

<sup>5</sup> See the *Cantiare Case* [1924] A.C. 226; Williston, s. 1974, note 7, *infra*, 701.

<sup>6</sup> See *Restatement*, s. 468 (3); Williston, s. 1977, *infra*, 703.

<sup>7</sup> This would not include benefits received from third persons, not conferred by, or due to the other party. The Act (s. 1 (6)) meets this point; *infra*, 689.

See Williston, s. 1978, *infra et seq.*, upon apportionment of the difference between chartered and Admiralty hire; *infra*, 704-706.

<sup>8</sup> See comment on subs. (3). See Williston, s. 1977, note 15 to s. 1977, *infra*, 703, note 6.

<sup>9</sup> Upon severability, see the observations of Salter, J., in *Putsman v. Taylor* [1927] 1 K.B. 637, 640. "Severance, as it seems to me, is the act of the parties, not of the court." See the judgment of Blackburn, J., in *Appleby v. Myers* (1867), L.R. 2 C.P. 651, 661, and *per* Bovill, C.J., in *Whincup v. Hughes* (1871), L.R. 6 C.P. 78, 81; *infra*, 676.

these rules shall apply only to that part of the contract which remains unperformed, and shall not affect or vary the price or other pecuniary consideration paid or payable in respect of that part of the contract which has been so performed.

(3) For the purpose of these recommendations no regard shall be had to amounts receivable under any contracts of insurance."<sup>1</sup>

Goddard, L.J., and Mr. W. F. Mortimer, in a *note* to the *Report*, point out that the report contained no recommendation regarding the converse case where the promisee had paid nothing: the loss here is still to lie where it falls. Those questions were outside the committee's terms of reference.<sup>2</sup>

## 6. Freight

### (a) *Freight pro rata itineris*

Upon the law relating to freight *pro rata itineris* no change was recommended.<sup>3</sup> The rule is that :—

"Unless otherwise agreed, either expressly or by implication, freight is only payable if the contract of carriage is completely performed. So that where the shipowner is prevented from carrying the goods to their destination he cannot claim any part of the freight, even though the failure to perform the contract is due to some cause beyond his control. The ship may have arrived at a place which is only just short of the contractual destination, and the cargo owner may have derived considerable benefit, amounting almost to performance, from the voyage but no freight is payable."<sup>4</sup>

Although the origin of the rule is uncertain and the rule itself is unsatisfactory, it has been "acquiesced in and acted upon" for so long that the committee did not consider a change either "desirable or necessary."

### (b) *Advance Freight*

The committee did not recommend any alteration in the

<sup>1</sup> Upon juristic concept implicit in the recommendation, see the speech of Lord Dunedin in *Sinclair v. Brougham* [1914] A.C. 427-439, 431-435, *supra*; Address on *Sinclair v. Brougham* in *Legal Essays and Addresses*, 1-33; Buckland, *Causes and Frustration in Roman and Common Law*, 46 Harv. L. Rev., 1281.

<sup>2</sup> Cmd. 6009, at 11.

<sup>3</sup> Cmd. 6009, at 8; Appendix B, 11.

<sup>4</sup> *Ib.*, Appendix B, 11: *Metcalfe v. Britannia Ironworks Co.* (1876), 1 Q.B.D. 613 (1877), 2 Q.B.D. 423. Claim to freight *pro rata* can only be made under a new contract, express or implied. See *per* Bramwell and Brett, L.J.J.; (1877), 2 Q.B.D., at 429, 431, 432. Lord Coleridge, C.J. (at 426), cites the rule as laid down by Parke, B., in *Vlierboom v. Chapman* (1844), 13 M. & W. 230, 238: "The true principle upon which this description of freight is due is that a new contract may be implied to pay it from the acceptance by the consignee of his goods delivered at an intermediate port instead of the destined port of delivery."

general law relating to *advance freight*.<sup>1</sup> Where ship or goods have been lost and freight is not earned, advance freight is, generally speaking, irrecoverable.<sup>2</sup> The rule is no part of the law merchant, nor is it found in the law of other countries,<sup>3</sup> but it is well established and was affirmed in 1871 by the Exchequer Chamber.<sup>2</sup> Although "unsatisfactory in principle," the rule has been "settled law for a long time past and the business practice of shipowners and insurers is to some extent based on it."<sup>4</sup> But, the committee recommended that—

"hire paid in advance under a time charter shall be recoverable in the event of frustration of the adventure in the same manner, and to the same extent, as other payments in advance made under a contract."<sup>5</sup>

Most time charters, they pointed out, provided expressly or by implication for an adjustment of hire in the case of loss or inefficiency of the ship; "it is probably only *per incuriam* that no similar provision is made in the case of frustration of the adventure."<sup>6</sup>

#### Note

See Dean John D. Falconbridge, K.C., *Frustrated Contracts The Need for Law Reform* (1945), 23 Can. Bar Rev. 43-60, setting out The Report, an account of *The Fibrosa Case* (*infra*, Chap. XXIV), and the Law Reform (Frustrated Contracts) Act, 1943 (*infra*, Chap. XXVII).

<sup>1</sup> Cmd. 6009, at 8, 10.

<sup>2</sup> *Byrne v. Schiller* (1871), L.R. 6 Ex. 20; 319; *supra*, 598.

<sup>3</sup> See the speech of Lord Shaw in the *Cantiare Case* [1924] A.C. 226, 251, citing the judgment of Lord President Inglis in *Watson & Co. v. Shankland* (1871), 10 M. 142, 152, upon repayment of prepaid freight, and the practice "of all the nations of the trading world with the exception of England."

<sup>4</sup> Cmd. 6009, Appendix B, 10.

<sup>5</sup> Cmd. 6009, at 8, 11. See *infra*, 692.

<sup>6</sup> *Ib.*, at 10. The committee quoted the *French Marine Case* [1921] 2 A.C. 494, 521, 523, on the hardship of the present rule; *supra*, 601-605,

## CHAPTER XXIV

### THE FIBROSA CASE

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### THE FIBROSA CASE

WHERE, before the outbreak of war, an English company had agreed to sell, and a Polish company had agreed to buy machinery for £4,800—one-third to be paid with the order, delivery c.i.f. Gdynia, Poland—and out of £1,600, £1,000 was paid with the order, and upon 23rd September, 1939, *before any machinery was delivered, Gdynia was occupied by the Germans*, a total failure of consideration had occurred: since the sum of £1,000 was not an absolute payment but a payment on account of the purchase price, and the buyers had not got what they bargained for, they were entitled, *in quasi-contract*,

to recover that sum from the sellers as money had and received to their use: *The Fibrosa Case*.<sup>1</sup>

### I. THE FACTS

*Fairbairn, Ltd.*, were makers of textile machinery at Leeds and by a contract made in July, 1939, they agreed, for the sum of £4,800, to supply to *Fibrosa* (a Polish company of Vilna) two sets of special flax-hackling machines which the parties intended should be erected at Vilna.<sup>2</sup> *Delivery* was to be in three to four months from settlement of details, c.i.f. Gdynia; a skilled monteur (whose services were included in the price) would be provided by the makers. Payment would be in London; one-third (£1,600) with order, balance against shipping documents. A "reasonable extension of time" would be granted if despatch were "hindered or delayed . . . by any cause whatsoever beyond our reasonable control including strikes, lock-outs, war, fire, accidents . . ."

In July, 1939, *Fibrosa* paid *Fairbairn* £1,000 on account of £1,600. On 1st September, 1939, Germany invaded Poland and on 3rd September Great Britain declared war on Germany. On 7th September *Fibrosa's* English agents asked *Fairbairn*, in view of the impossibility of delivery, to return the initial payment of £1,000. *Fairbairn* refused, saying that considerable work had been done on the machines—two had been completed: they could sell the machinery with no loss; would *Fibrosa* concur? After the war the matter could be reconsidered. *Fibrosa* suggested that the machines could be delivered at Vilna, in Lithuania, a neutral country. On 22nd September, Poland was declared to be enemy territory. In May, 1940, *Fibrosa* issued a writ, claiming (a) damages for breach of contract, (b) specific performance or, alternatively, return of the £1,000 with interest, and (c) further or other relief. The main defence was that upon the occupation of Gdynia, the contract was frustrated and that no right to a return of the money arose.

At the hearing, the material facts were admitted. It was agreed that before December, 1939, *Fibrosa* had expressed willingness to take delivery at Riga or Leeds.

### II. JUDGMENT OF TUCKER, J.

Tucker, J., said that the mere outbreak of war between Great Britain and Germany did not frustrate a contract between the subjects of friendly countries; until the occupation of

<sup>1</sup> *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour, Ltd.* [1943] A.C. 32 (June, 1942), reversing the decision of the Court of Appeal (*sub nom. Fibrosa Société Anonyme v. Fairbairn Lawson Combe Barbour, Ltd.*) [1942] 1 K.B. 12, which had affirmed the judgment of Tucker, J. (Upon the name, see note, *ib.*)

See Glanville L. Williams, *The End of Chandler v. Webster*, 6 Mod. L. Rev. 46.

<sup>2</sup> These facts are taken from the summary [1943] A.C. 33-34.

Gdynia performance would have been suspended for a reasonable time.<sup>1</sup> Upon the occupation, and under the Trading with the Enemy Act, 1939, the contract became frustrated. The requirement "c.i.f. Gdynia" was a term of the contract, not solely for the benefit of the purchaser: it could not be waived by an offer to take delivery at Riga or Leeds<sup>2</sup>; upon this term the vendor was entitled to insist. In the case of an *f.o.b. contract*,<sup>3</sup> that was clearly the law; the same rule must apply to a *c.i.f. contract*: "... a term in a contract as to the mode of delivery was not inserted wholly for the benefit of one party to the contract without the consent of the other party," Bailhache, J., had said.<sup>4</sup> As long as *Chandler v. Webster*<sup>5</sup> remained the law, the sum of £1,000, it was agreed, could not be recovered.<sup>6</sup> Tucker, J., gave judgment for *Fairbairn*. *Fibrosa* appealed.

### III. IN COURT OF APPEAL

*Fibrosa* argued that the contract was suspended and that a reasonable extension of time must be granted. For war the parties had expressly provided: there was no room for an implication giving rise to frustration. The suspensory clause was not void; the contract did not contemplate delivery to an enemy subject: delivery at Gdynia could be, and was, waived. If the contract were frustrated, the plaintiffs ought to be repaid £1,000.<sup>7</sup>

The sellers contended that the war, its duration being uncertain, caused frustration which operated independently of the parties' intention. The position crystallised when, on 23rd September, 1939, Gdynia was occupied: the contract was then dissolved by operation of law. Clause 7 could not give an indefinite extension of time. Assuming frustration, the part payment was irrecoverable: in any case, regard must be had to the expenses already incurred by the sellers.<sup>8</sup> The appeal was dismissed.

MacKinnon, L.J. (delivering the judgment of the Court), said *first*, that in *Jackson's Case*,<sup>9</sup> although perils of the seas were excepted, "the contract was held to have been terminated

<sup>1</sup> [1942] 1 K.B., at 17.

<sup>2</sup> *Ib.*, at 19.

<sup>3</sup> *Ib.*, at 20, 21.

<sup>4</sup> *Maine Spinning Company v. Sutcliffe and Company* (1917), 34 T.L.R. 154, 155: "Deliver *f.o.b.* Liverpool" did not entitle the buyers to claim delivery at Liverpool without the goods having been put on board ship. Bailhache, J., quoted *Wackerbarth v. Masson* (1812), 3 Camp. 270, 271. Where, in a contract for the sale of sugar, "*f.o.b.* a foreign ship," the buyer asked the seller to deliver the sugar into his own hands or to transfer it into his own name in the books of the warehouse, Lord Ellenborough, C.J., said that the seller might thereby have been exposed to some risk, or might have lost some advantage; "and he had a right to refuse as it was not the mode of delivery for which he had stipulated."

<sup>5</sup> [1904] 1 K.B. 493.

<sup>6</sup> [1942] 1 K.B., at 22

<sup>7</sup> [1942] 1 K.B., at 22, 23.

<sup>8</sup> *Ib.*, at 24, 25.

<sup>9</sup> (1873), L.R. 8 C.P. 572, 584; *supra*, 474-476.



by an overwhelming disaster within that category.”<sup>1</sup> The parties had provided for a “reasonable extension” of time. In September, 1939, the contract was frustrated.

*Secondly*, “the rigour of the obligations” of a c.i.f. contract is “well settled: if a man sells c.i.f. June shipment and he tenders a bill of lading dated in July, the buyer can treat the contract as broken, and it is in vain for the seller to say that the goods are just as good as they would be if shipped earlier. Conversely, if an embargo or prohibition prevented shipment abroad, the buyer could not possibly say: ‘You can buy those goods in this country, and deliver them to me here, and if you do not carry out that different obligation I can claim damages’.”<sup>2</sup>

*Thirdly*, the court was bound by *Chandler v. Webster*<sup>3</sup> to reject the claim for recovery of £1,000. If the doctrine of frustration —“discovered or enunciated in 1863”—had “added as part of the implied term a provision that a party to a contract who, by part performance, had received a benefit should compensate the other for that benefit, it might well have been thought a reasonable addition.”<sup>4</sup> If the House overruled *Chandler v. Webster*<sup>3</sup> and substituted “a rule like the more civilised rule of Roman and Scottish law, presumably some inquiry will be necessary to determine how much, if anything, of the £1,000 the defendants ought to restore to the plaintiffs.”<sup>5</sup> *Fibrosa* appealed to the House of Lords.

#### IV. IN HOUSE OF LORDS

At the outset of the argument, Viscount Simon, L.C., asked whether the company, having its seat at Vilna, must not be regarded as an alien enemy.<sup>6</sup> The appellants needed a licence from the Crown to proceed; the House would continue with the hearing on that assumption, but would expect such licence to be procured. Upon the suggestion of the Lord Chancellor, a licence was obtained from the Board of Trade.<sup>7</sup> If the appellants

<sup>1</sup> [1942] 1 K.B., at 26.

<sup>2</sup> *Ib.*, at 27.

<sup>3</sup> [1904] 1 K.B. 493; *supra*, 596.

<sup>4</sup> *Ib.* This, said MacKinnon, L.J., was the unsuccessful argument in the *Teutonia* (1871), L.R. 3 Ad. & Ecc. 394, 405, 406: “One may suspect that it may have been suggested by the very learned junior counsel for the defendants.” (Mr. Arthur Cohen.)

<sup>5</sup> [1942] 1 K.B., at 28.

<sup>6</sup> [1943] A.C. 32, 35. When the action was tried and was before the Court of Appeal, Vilna (absorbed into Lithuania in October, 1939, which, in August, 1940, was itself absorbed into Russia) had not been occupied. It was occupied in June, 1941, upon the German invasion of Russia.

<sup>7</sup> *Ib.*, 39, 40. *per* Viscount Simon, L.C. But see the observation of Viscount Simon later in *The Soufracht Case* [1943] A.C. 203, 208, *arguendo*, doubting whether

were alien enemies, any payment that became due would be regulated by the Trading with the Enemy Act, 1939.<sup>1</sup>

The appellants argued that if the court had power to imply a term frustrating the contract, "it must imply a *reasonable* term and not a term such as no commercial man would think of entering into." A term which allowed the respondents, having suffered no loss, to keep the money, would not be reasonable. A *total failure of consideration* had occurred and the buyers were entitled to the return of their money—not *ex contractu*, but in *quasi-contract* by operation of law, as a party who has not got what he bargained for. The doctrine of failure of consideration was not limited to cases where the contract was rescinded *ab initio*.<sup>2</sup>

For the respondents it was contended that *Chandler v. Webster*<sup>3</sup> was good law and was too firmly established to be disturbed. It was not "so manifestly wrong" as to justify the House in overruling a decision followed for forty years. The rule had great advantages: (1) it was easily understood and easily applied by the commercial community; and (2) it did rough justice between the parties in cases where some degree of hardship was inevitable. The rule had been accepted by the House of Lords in *The French Marine Case*.<sup>4</sup> There was *no fault on the makers' part*, and even if the consideration had wholly failed, the buyers could not reclaim.<sup>5</sup>

In the *Cantiare Case*<sup>6</sup>—it was said in reply—*Chandler v. Webster*<sup>3</sup> was treated as open. In *Bourne v. Keane*<sup>7</sup> the House had overruled "a long standing line of authorities."

# 1. VISCOUNT SIMON, L.C.

## (a) *Rule in Chandler v. Webster*

On *suspension*, Viscount Simon, L.C. said that "the ambit of the express condition is limited to delay in respect of which 'a reasonable extension of time' might be granted. That might mean a minor delay as distinguished from a prolonged and indefinite interruption of prompt contractual performance

the licence in *The Fibrosa Case* obtained from the Board of Trade was "regular." The House accepted it, but "it must not be taken that the House has laid it down that a company domiciled in territory occupied by the enemy can litigate to its heart's content provided it obtains the consent of the Board of Trade." See Viscount Simon's *seventh conclusion* (*ib.*, at 212); *supra*, 97, 151, 152, note 3.

<sup>1</sup> *Ib.*, 40 The appeal in *The Sovfracht Case* had not yet come before the House.

<sup>2</sup> [1943] A.C. 35, 36

<sup>3</sup> [1904] 1 K.B. 493. See also *per* Lord Esher, M.R., in *London Foundry Association v. Clarke* (1888), 20 Q.B.D. 576, 581.

<sup>4</sup> [1921] 2 A.C. 494, 523. <sup>5</sup> [1943] A.C., at 36 39. <sup>6</sup> [1924] A.C. 226.

<sup>7</sup> [1919] A.C. 815, 859, 860, *per* Lord Birkenhead, L.C. See principles laid down by Lord Buckmaster (at 874).

which the present war manifestly and inevitably brings about."<sup>1</sup> During the war, a British subject could not lawfully agree to deliver c.i.f. Gdynia and therefore the contract could not be further performed: "A provision providing for a reasonable extension of time if dispatch is delayed by war cannot have any application when the circumstances of the war make dispatch illegal."<sup>2</sup>

Could *Fibrosa*, upon frustration, claim back the £1,000? The principle laid down in *Chandler v. Webster*<sup>3</sup> was that "when a contract has been frustrated by such a supervening event as releases from further performance, the loss lies where it falls, with the result that sums paid or rights accrued before that event are not to be surrendered, but all obligations falling due after that event are discharged."<sup>4</sup>

The proposition first appeared in *Blakeley v. Muller & Co.*<sup>5</sup> Channell, J., said:—

"It is impossible to import a condition into a contract which the parties could have imported and have not done so. All that can be said is that, when the procession was abandoned the contract was off, not that anything done under the contract was void. The loss must remain where it was at the time of the abandonment. It is like the case of a charterparty time of the abandonment."<sup>6</sup>

The same view was taken by the Court of Appeal in *The Civil Service Co-operative Society Case*<sup>7</sup> where the Earl of Halsbury, L.C., concurred with Channell, J.'s judgment.<sup>8</sup>

### (b) Contractual provision in event of frustration

In approaching the problem anew, said Viscount Simon, the first consideration was always "the terms of the particular contract."<sup>9</sup> Is the contract "divisible"? Is a sum payable "in respect of completion of a defined portion of the work"? If so, that sum is probably not returnable if completion of the whole work is frustrated. *Does the contract, on its true construction, stipulate what is to be done, if frustration occurs, about money already paid? If so, this "governs the matter."*<sup>10</sup>

<sup>1</sup> [1943] A.C., at 40, approving MacKinnon, L.J.'s observation in [1942] 1 K.B. 12, 22, on *Jackson's Case* (1873), L.R. 8 C.P. 572, 587, and applying the dictum of Lush, J., in *Geipel v. Smith*, L.R. 7 Q.B. 404, 414.

<sup>2</sup> [1943] A.C., at 41, citing *The Ertel Bieber Case* [1918] A.C. 260; *supra*, 191.

<sup>3</sup> [1904] 1 K.B. 493; *supra*, 596.

<sup>4</sup> [1943] A.C., at 41, 42.

<sup>5</sup> [1903] 2 K.B. 760n. The court purported to apply *Appleby v. Myers* (1867), L.R. 2 C.P. 651. When, in the course of erecting machinery, the premises were destroyed by fire, both parties were excused and no liability accrued on either side. *The price was not due until completion.* *Supra*, 460, note 3.

<sup>6</sup> [1903] 2 K.B. 762n; *supra*, 594.

<sup>7</sup> *Ib.*, at 756; *supra*, 595.

<sup>8</sup> *Ib.*, at 764, 765; *supra*, 595.

<sup>9</sup> [1943] A.C., at 42.

<sup>10</sup> *Ib.*, at 42, 43.

The rule that "*advance freight*," if the voyage is not completed, is not returned, is "a stipulation introduced into such contracts by custom."<sup>1</sup> *A fortiori*, if the prepayment is expressly "out and out": the cricket spectator cannot recover his entrance money where rain has prevented play, if "expressly or by proper implication, the bargain with him is that no money will be returned."<sup>2</sup> Since frustration may be explained as arising from an implied term, it was "tempting to speculate whether a further term could be implied as to what was to happen, in the event of frustration, to money already paid." But the parties "could not be supposed to have agreed on a simple formula which would be fair in all circumstances"; in the absence of such agreement, the law must decide.<sup>3</sup>

(c) *When Long Standing Rule should be reversed*

The "supposed rule" in *Chandler v. Webster*<sup>4</sup> has been "constantly applied in a great variety of cases"; this was the first occasion on which the rule could be effectively challenged. The Scottish rule was very different. The Earl of Birkenhead, in *The Cantuari Case*, was careful to reserve the question whether *Chandler v. Webster* was rightly decided.<sup>5</sup> Lord Dunedin had referred to "the different angle of approach from which an English or Scottish judge would look at the question": English law was reluctant to order the repayment of money once paid.<sup>6</sup> Lord Shaw vigorously denounced the proposition that the loss lies where it falls, as working well enough "among tricksters, gamblers and thieves"; it was not the law of Scotland!<sup>7</sup>

It had been argued that the House should not disturb a rule that had prevailed for nearly forty years, frequently affirmed, constantly applied—a simple rule against which the parties could, if they wished, expressly provide. "Weighty considerations," Viscount Simon observed, but "our primary duty" was to secure that the law was "correctly expounded and applied."<sup>8</sup> Otherwise, "the error may spread in other directions, and a portion of our law be erected on a false foundation."<sup>9</sup> The rule has "not escaped much unfavourable criticism."<sup>10</sup>

(d) *Two Criticisms of Rule*

The *locus classicus* was the judgment of Sir Richard Henn

<sup>1</sup> *Ib.* See *Byrne v. Schiller* (1871), L.R. 6 Ex. 319, 327, per Montague Smith, J., who speaks of the payment as depending on "an implied understanding that it shall be made once for all, and shall not be subject to any contingency."

<sup>2</sup> [1943] A.C., at 43.

<sup>3</sup> [1904] 1 K.B. 493; *supra*, 596.

<sup>4</sup> [1924] A.C. 226, 233; cited [1943] A.C. 45.

<sup>5</sup> [1924] A.C., at 247, 248.

<sup>6</sup> *Ib.*, at 259; cited [1943] A.C. 44.

<sup>7</sup> [1943] A.C., at 44.

<sup>8</sup> *Ib.*, at 45.

<sup>9</sup> *Ib.*, at 45, citing *The Russkoe Case*, 10 Ll. L. Rep. 214, per Atkin, L.J.

Collins, M.R., in *Ohandler v. Webster*<sup>1</sup> : not a considered judgment yet one to be approached "with all the respect due to so distinguished a common lawyer."<sup>2</sup> He regarded the proposition, that in such cases money could not be recovered back, as flowing from *Taylor v. Caldwell*<sup>3</sup>; yet there, no question of recovery arose, nor did Blackburn, J., in terms, affirm the proposition that "the loss lies where it falls." Collins, M.R., after saying that, until impossibility had occurred, the contract remains "a perfectly good contract up to that point" and everything previously done in pursuance of it must be treated as rightly done, but the parties are both discharged from further performance of it," continued :—

"If the effect were that the contract were wiped out altogether, no doubt the result would be that the money paid under it would have to be repaid as on a failure of consideration. But that is not the effect of the doctrine; it only releases the parties from further performance of the contract. Therefore the doctrine of failure of consideration does not apply."<sup>4</sup>

The reasoning in "this crucial passage," said Viscount Simon, was open to two criticisms :—

*First*, the claim to recover money on the ground that the consideration has totally failed, was not based on the contract; it "arises because, in the circumstances that have happened, the law gives a remedy in quasi-contract to the party who has not got that for which he bargained. It is a claim to recover money to which the defendant has no further right because in the circumstances that have happened the money must be regarded as received to the plaintiff's use."<sup>5</sup>

The effect of frustration, it is true, is that up to that point the contract remains "perfectly good" and anything previously done under it must be treated as "rightly done." But to reclaim money on the ground of total failure of consideration is "not to vary the terms of the contract."<sup>6</sup>

"The claim arises not because the right to be repaid is one of the stipulated conditions of the contract, but because, in the circumstances that have happened, the law gives the remedy. It is the failure to distinguish between (1) the action of assumpsit for money had and received in a case where the consideration has wholly failed, and (2) an action on the contract itself, which explains the mistake which

<sup>1</sup> [1904] 1 K.B. 493, 499. The principle (it should be observed) was restated by Collins, M.R., in *Elliott v. Crutchley* [1904] 1 K.B. 565, 568, and this judgment was approved by Lord Sumner in *The French Marine Case* [1921] 2 A.C. 494.

<sup>2</sup> [1943] A.C., at 45.

<sup>3</sup> (1863), 3 B. & S. 826.

<sup>4</sup> [1904] 1 K.B. 409; cited [1943] A.C. 45, 46.

<sup>5</sup> [1943] A.C., at 46.

<sup>6</sup> *Id.*, at 46, 47.

I think has been made in applying English law to this subject-matter."<sup>1</sup>

True; the plaintiff could not sue *on* the contract to recover a payment the consideration for which had failed: *dehors* the contract he *could* sue. In *Appleby v. Myers*,<sup>2</sup> after the fire, both parties were excused from further performance, and "no liability" accrued on either side, i.e., no liability *under the contract*: "the learned judge seems to have thought that no action to recover money in such circumstances as the present could be conceived of unless there was a term of the contract, express or implied, which so provided."<sup>3</sup>

"Once it is realised that the action to recover money for a consideration which has wholly failed rests, not on a contractual bargain between the parties, but, as Lord Sumner said in *Sinclair v. Brougham*,<sup>4</sup> 'upon a notional or imputed promise to repay'; or (if it is preferred to omit reference to a fictitious promise) upon an obligation to repay arising from the circumstances, the difficulty in the way of holding that a prepayment made under a contract which has been frustrated can be recovered back appears to me to disappear."<sup>5</sup>

*Secondly*, there is a distinction between cases where the contract is "wiped out altogether," e.g., because, being illegal *at the start*, it is void, and cases where supervening impossibility releases the parties *from further performance*. Does this justify the deduction—Viscount Simon asks—that the doctrine of failure of consideration does not apply where the contract remains good until frustration?<sup>6</sup> True; the payer has had the advantage, "whatever it may be worth," of the promise of the other party. In the *formation* of a contract, a *promise* may be the consideration. But in the law of *failure of consideration and of quasi-contractual recovery*, it is not the promise but the *performance of the promise* that is the consideration:

<sup>1</sup> [1943] A.C., at 47.

<sup>2</sup> (1867), L.R. 2 C.P. 651. It was unsuccessfully argued for the plaintiff that in the circumstances of that case "the law implies" a contract to pay for the work done and the materials supplied (at 653). Blackburn, J., said: "The whole question depends upon the true construction of the contract between the parties" (at 658). Under such a contract nothing could be recovered until the *whole work* was completed (at 659).

The judgment of the court below was reversed. (1866), L.R. 1 C.P. 615, 621, 623, where Montague Smith, J., had said that since the machinery, as it was erected, became the defendant's property, there was an implied promise on his part to keep up the building, and the plaintiffs were entitled, *as upon an implied contract*, to be paid for the work done and the materials supplied.

<sup>3</sup> *See* Blackburn, J., [1943] A.C., at 47.

<sup>4</sup> [1914] A.C. 398, 452. "All these causes of action" (sc. to recover money paid under a mistake of fact, or for a consideration that has wholly failed "are common species of the genus *assumpsit*. All now rest, and long have rested, upon a notional or imputed promise to repay."

<sup>5</sup> [1943] A.C., at 47.

<sup>6</sup> *Ib.*, at 48.

"The money was paid to secure performance, and if performance fails the inducement which brought about the payment is not fulfilled."<sup>1</sup>

Otherwise, there never could be recovery for failure of consideration: has not the payer had a promise of performance? But "endless examples"<sup>2</sup> show that where there was a promise which remained unfulfilled, money can be recovered as for a complete failure of consideration. In *Rugg v. Minett*,<sup>3</sup> R bought casks of turpentine oil at an auction. The seller was to make up each cask to a prescribed quantity and only then would the property pass. R paid in advance on account, and after some of the casks had been filled, a fire occurred. He was entitled to recover what he had paid towards the casks which, at the time of the fire, had not been filled.

"A simple illustration of the same result is an agreement to buy a horse, the price to be paid down, but the horse not to be delivered and the property not to pass until the horse has been shod. If the horse dies before the shoeing, the price can unquestionably be recovered as for a total failure of consideration, notwithstanding that the promise to deliver was given."

The same doctrine applied where the frustrating event was the "cessation or non-existence of an express condition or state of things going to the root of the contract, and essential to its performance."<sup>4</sup>

"I can see no valid reason why the right to recover prepaid money should not equally arise on frustration arising from supervening circumstances as it arises on frustration from destruction of a particular subject-matter."<sup>5</sup>

The rule in *Chandler v. Webster*<sup>6</sup> was wrong and *Fibrosa* could recover their £1,000.

This result, however, did not, *in all cases*, deal fairly between the parties. The recipient might have incurred *expenses* in part performance equal to, or greater than, the prepaid sum which he has to return. He might have executed almost the whole of the contractual work which might be left on his hands:

"the English common law does not undertake to apportion a prepaid sum in such circumstances."<sup>7</sup>

<sup>1</sup> [1943] A.C., at 48.

<sup>2</sup> *Ib.*, referring to notes in Bullen and Leake, *Precedents of Pleading*, 9th ed., 263.

<sup>3</sup> (1809), 11 East 210, 217. "The property had not passed," said Lord Ellenborough, C.J., and therefore the buyers were not bound to pay for them.

<sup>4</sup> *Krell v. Henry* [1903] 2 K.B. 740, 748, *per* Vaughan Williams, L.J.

<sup>5</sup> [1943] A.C., at 49.

<sup>6</sup> [1904] 1 K.B. 493; *supra*, 596.

<sup>7</sup> [1943] A.C., at 49, contrasting Partnership Act, 1890, s. 40, whereby, if a partnership is prematurely dissolved, a premium may be apportioned by the court, "as it thinks just."

It must be for the Legislature whether provision should be made for "an equitable apportionment of prepaid moneys."

## 2. LORD ATKIN

### (a) *Problem stated*

Lord Atkin said that the contract came to an end when a state of war arose which caused an *indefinite delay* un contemplated by the parties and the *legal impossibility* of delivery at an enemy-occupied port.<sup>1</sup> "The commercial adventure was frustrated." The legal effects of frustration were not determined for the first time either by the "coronation cases" or by the cases arising out of the last war. The principle of law is the same whether further performance becomes impossible by the perishing of the subject-matter or by the cessation or non-existence of an express condition or state of things going to the root of the contract and essential to its performance<sup>2</sup>:

"when a contract which is still executory on one or both sides is subject to frustration the law is that when the event happens the parties are excused from further performance, but have to give effect to rights under the contract already accrued before the happening of the event."<sup>3</sup>

Lord Atkin puts the problem in this form: A sells a horse to B for £50, delivery in a month, price to be paid forthwith, property not to pass until delivery, B to pay to A an agreed sum weekly during the month for the keep of the horse. The horse dies in a fortnight. A is excused from delivery, B from taking delivery. B must pay the sum due for two weeks' keep. But what of the £50? The answer that would occur to most people was that "the buyer ought to get his money back, having had nothing for it, and the lawyer would support the claim by saying that it is money had and received to the use of the buyer, being money paid on a consideration which has wholly failed."<sup>3</sup>

### (b) *Recovery not dependent on rescission*

Lord Atkin found difficulty in understanding how Sir Richard Henn Collins, M.R.—"this great lawyer"—concluded that the claim for money paid on a consideration which had wholly failed could only be made when the contract was "wiped out altogether."<sup>4</sup> For that proposition there was no authority. In numerous cases where no rescission has occurred, an action to recover money has lain.<sup>5</sup>

<sup>1</sup> [1943] A.C., at 50.

<sup>2</sup> *Per* Vaughan Williams, L.J., in *Krell v. Henry* [1903] 2 K.B. 740, 748.

<sup>3</sup> [1943] A.C., at 50, 51.

<sup>4</sup> *Ib.*, 52, referring to *Chandler v. Webster* [1904] 1 K.B. 493, 499.

<sup>5</sup> *Ib.*, citing *Giles v. Edwards* (1797), 7 T.R. 181, where the defendant neglected to cord wood sold to the plaintiff and the plaintiff recovered on a contract that



That part of the judgment in *Chandler v. Webster*,<sup>1</sup> which refused to allow the plaintiff to reclaim the sum paid on the ground of total failure of consideration, was wrong.<sup>2</sup> The consideration for the part payment was the *promise* to deliver; until performance was excused the promise was effective. It was not necessary to use "consideration" in two meanings:—

"I understand by the phrase that the promise to deliver goods totally failed because no goods were or could be delivered, and that therefore a cause of action accrued to the appellants."<sup>2</sup> To give Webster judgment on the counter-claim was equally wrong. The right to receive the balance had accrued before frustration, but, if paid, it could have been recovered back; the rule against circuity of action would have been a defence to the counter-claim.<sup>2</sup> *Frustra petis quod mox es restitutus*<sup>3</sup>: "the expression aptly fits the English law in this respect."<sup>4</sup> In *The French Marine Case*<sup>5</sup> the present question did not arise: no total failure of consideration had occurred but partial only, "for which in law no *pro rata* repayment could be claimed."<sup>4</sup>

(c) *Where nothing received in return*

In *The Cantiare Case*,<sup>5</sup> the English law was treated as open in the House of Lords. According to Scots law, where a contract is frustrated, sums paid in advance can be restored "and it is satisfactory to find that the English and Scots law now agree

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had failed and that he had a right to end. *Rugg v. Mynett* (1809), 11 East 210, *supra*; *Nockells v. Crosby* (1825), 3 B. & C. 814, where subscribers to a scheme for establishing a tontine, which project the directors subsequently abandoned, were entitled to recover the whole of the money advanced, without deduction of any part towards the expenses incurred; *Wilson v. Church* (1879), 13 Ch. D. 1, 49, 50, where a concession to complete a railway having been revoked, bondholders were entitled to their money back which was still *in medio* in the hands of trustees (*per* Brett, L.J., for a statement of the general principle: "where money is paid for a consideration which is to be performed after the payment, if that consideration wholly fails, the money becomes money in the hands of the borrowers held to the use and for the benefit of the lenders, and must be returned"); *National Bolivian Navigation Company v. Wilson* (1880), 5 A.C. 176, 185 (*per* Earl Cairns, L.C.); *Johnson v. Goslett* (1857), 2 C.B. (N.S.) 569, where the plaintiff recovered his deposit paid for shares in a mine where the majority of the shares were not taken and the concern was abandoned; *Ashpitel v. Sercombe* (1850), 5 Ex. 147, 161, 162, where a plaintiff similarly recovered his deposit—without deduction of expenses which the directors had incurred—for shares in a railway company which had been abandoned for want of sufficient subscribers (*per* Patteson, J., delivering the judgment of the Court, Patteson, Coleridge, Maule, Cresswell, Wightman, Erle and Williams, JJ.—"all masters of the common law," *per* Lord Wright [1943] A.C., at 66); *Devaux v. Conolly* (1849), 8 C.B. 640, where the plaintiffs recovered a sum overpaid for goods delivered.

<sup>1</sup> [1904] 1 K.B. 493.

<sup>2</sup> [1943] A.C., at 53.

<sup>3</sup> Cited by Lord Dunedin, in *The French Marine Case* [1921] 2 A.C. 494, 511.

<sup>4</sup> [1943] A.C., at 54.

<sup>5</sup> [1924] A.C. 226.

on this point."<sup>1</sup> Whether the defender could claim an adjustment for expenses was not decided.<sup>2</sup>

That this rule may cause hardship is "incontrovertible"<sup>3</sup>:

"One party may almost have completed expensive work; he can get no compensation. The other party may have paid the whole price, and if he has received but a slender part of the consideration he can get no compensation. At present it is plain that if no money has been paid on the contract there is no legal principle by which loss can be made good. What is now being decided is that the application of an old-established principle of the common law does enable a man who has paid money and received nothing for it to recover the money so expended. At any rate, it can be said that it leaves the man who has received the money and gives nothing for it in no worse position than if he had received none."<sup>3</sup>

The contract could provide for "the risk of frustration." The general doctrine is "independent of a special contract and only comes into play when further performance of the latter is precluded." This doctrine is that

"the man who pays money in advance on a contract which is frustrated and receives nothing for his payment is entitled to recover it back."<sup>3</sup>

### 3. LORD RUSSELL OF KILLOWEN: WHERE RULE STILL APPLIES

Lord Russell of Killowen, observed that "the rule in *Chandler v. Webster*<sup>4</sup> should rather be called

"the rule (to put it shortly) that in cases of frustration loss lies where it falls, or (at greater length) that where a contract is discharged by reason of supervening impossibility of performance payments previously made and legal rights previously accrued according to the terms of the contract will not be disturbed, but the parties will be excused from liability further to perform the contract."<sup>3</sup>

Collins, M.R., did not purport to be laying down new law.

"If no such money has been paid the rule must apply; for I know no principle of English law which would enable either party to a contract which has been frustrated to

<sup>1</sup> [1943] A.C., at 54.

<sup>2</sup> Lord Hunter (the Lord Ordinary) had permitted the defenders to amend their pleas to counter-claim expenses, "a proceeding," said Lord Atkin, "which in any event I do not understand" (*ib.*). He added that there seemed no direct authority for this in Scots law, and "a dictum of great weight against it in *William Watson and Co. v. Shankland* (1871), 10 M. 142, 152, per Lord President Inglis: "and if I am not *lucratus* at all, I shall be entitled to repetition of the whole advance, however great his expenditure and consequent loss may have been."

<sup>3</sup> [1943] A.C., at 55.

<sup>4</sup> [1904] 1 K.B. 493.

receive from the other compensation for any expense, or indemnity from any liability, already incurred in performing the contract. Nor could moneys paid before frustration be recovered if the person making the payment has received some part of the consideration moving from the other party for which the payment was made. In such a case the rule would still apply."<sup>1</sup>

In the present case the consideration moving from the manufacturers was either *delivery* or the *promise to deliver*. Delivery was the consideration but, on any view, no part of the consideration for which part of the price was paid reached *Fibrosa*.<sup>2</sup>

Why, then, should *Fibrosa* not be entitled to get their money back when the consideration had wholly failed?

"This is a right which in no way depends on the continued existence of the frustrated contract. It arises from the fact that the impossibility of performance has caused a total failure of the consideration for which the money was paid."<sup>3</sup>

The right to recover money paid for a consideration which had failed does not depend on the contract being void *ab initio*: "the money was recoverable under the common *indebitatus* count as money received for the use of the plaintiff."<sup>3</sup>

It had been submitted that money paid for a consideration which had failed was only recoverable when failure was due to fault of the other party. On the authorities the submission was ill founded.<sup>4</sup>

"The rule that on frustration the loss lies where it falls cannot apply in respect of moneys paid in advance when the consideration moving from the payee for the payment has wholly failed so as to deprive the payer of his right to recover moneys so paid as moneys received to his use, but . . . the rule will (unless altered by legislation) apply in all other respects."<sup>5</sup>

#### 4. LORD MACMILLAN: "TWO WAYS OF THINKING"

Every system of law, Lord Macmillan declared, must define the consequences of frustration. That frustration releases

<sup>1</sup> [1943] A.C., at 56.

<sup>2</sup> *Ib.*, at 56.

<sup>3</sup> *Ib.*, at 57, citing *Wright v. Newton* (1835), 2 C. M. & R. 124, 127, where the purchaser was entitled to the return of his deposit when the contract of sale, which was conditional, was defective.

<sup>4</sup> *Ib.* See *Jenks' Digest of English Civil Law*, vol. I, s. 736; *Bullen and Leake* (1868), 3rd ed., 49; money irrecoverable "where the consideration fails partly through his own default," citing *Straton v. Rastall* (1788), 2 T.R. 366, 370, *per Buller, J.*: "in order to recover money in this form of action, the party must show that he has equity and conscience on his side, and that he could recover in a court of equity," *sed quere*; *Stray v. Russell* (1859), 28 L.J. Q.B. 279, 283, on which, see *Stable, J.*'s comment in *The Dies Case* [1939] 1 K.B. 724, 743, 744. And see *Sigalas v. Schweizerische Reederei A.G.* (1942), 72 Ll. L. Rep., 255, 258, *per Atkinson, J.*

<sup>5</sup> *Ib.*, at 57.

both parties from further performance of any of the stipulations of the contract, is agreed. Each must fulfil his obligations until impossibility supervenes. Must the law stop there? If money has been paid, or work has been done, or liabilities have been incurred, must the parties be left where they stood—the event being treated as a “mere accident”—when the contract was frustrated? On the other hand, the law may “endeavour to effect an equitable adjustment between the parties.”<sup>2</sup>

Neither of these solutions can be “productive of complete justice.” To leave matters as they stood may mean great gain to one party and great loss to the other: “a confession of impotence in the face of a problem deemed to be inextricable.” *Nemo debet locupletari aliena jactura*. To attempt to restore the *status quo ante* is “to attempt the impossible.”

“At best some sort of equitable accommodation can be achieved which must inevitably fall short of complete justice. The process is sought to be rationalised on a theory of quasi-contract. The parties have made no provision in their contract for the event which has frustrated it, so the law implies for them what it assumes they would have agreed on if they had had the unforeseen contingency in contemplation when they entered into their contract. On another view, restitution is regarded as a separate principle of the law independent of contract.”<sup>3</sup>

The law of Scotland, following Roman law, has accepted the principle of restitution. The law of England has adopted the first method: “each party shall be left as he stood, despairing of the practicability of conjecturing and enforcing what the parties might be assumed to have agreed on if they had contemplated and provided for the unforeseen contingency.”<sup>3</sup> “The rigour of the doctrine,” however, has been “characteristically mitigated” in one instance—where, under a contract, money has been paid by one party to another for a consideration which has completely failed. The right to recover such sum under the common *indebitatus* count for money received has long been fully recognised.<sup>4</sup>

### 5. LORD WRIGHT

Lord Wright—“the greatest Mansfieldian of them all”<sup>5</sup>—declared the trichotomy of contract, tort, and quasi-contract: “any civilised system of law is bound to provide remedies

<sup>1</sup> [1943] A.C., at 58.

<sup>2</sup> *Ib.*, Lord Macmillan quotes from Pufendorf, *Law of Nature and Nations*, 1872 (English trans. 1703, p. 225), for “this doctrine of restitution stated in its broadest terms.”

<sup>3</sup> *Ib.*, at 59.

<sup>4</sup> *Ib.*, at 61, citing *Bullen and Leake* (1868), 3rd ed., 44 *et seq.* See at 48 *et seq.*

<sup>5</sup> *Lord Mansfield Revisited*, in Mr. Justice Shientag's *Moulders of Legal Thought*

for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called quasi-contract or restitution."<sup>1</sup>

The "root idea" was stated in *R. E. Jones, Ltd. v. Waring and Gillow, Ltd.*<sup>2</sup>—concerning "a particular species of the category," *money paid under a mistake of fact*. Another class is where there is prepayment on account of consideration for the performance of a contract which becomes frustrated—so that the money never becomes due. "There was in such circumstances no intention to enrich the payee." Claims to recover *money paid for a consideration which has failed* are assumed by Holt to be commonplace.<sup>3</sup>

(a) Lord Mansfield: "*The Law implies a Debt*"

"The basis of the modern law of quasi-contract"<sup>4</sup> is found in the statement of Lord Mansfield in *Moses v. Macferlan*<sup>5</sup>:

"If the defendant be under an obligation from the ties of natural justice to refund; the law implies a debt, and gives

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(1943), New York, 154. See *Legal Essays and Addresses*, 12:

"It did not occur to me at first that I was to some extent aligning myself after a long interval of time in these matters with that great judge, Lord Mansfield, perhaps the greatest of the English judges."

<sup>1</sup> [1943] A.C., at 61. "... unjust enrichment has no relation as a juristic conception with contract at all... the dichotomy does not correspond to any juristic classification, and is of no significance for common law decisions." (*Legal Essays and Addresses*, 15.)

For definition of quasi-contract, see Professor P. H. Winfield, *The Province of the Law of Tort* (1931), 119.

<sup>2</sup> [1926] A.C. 670, 696. Lord Sumner said, referring to *Kelly v. Solari* (1841), 9 M. & W. 54, 58 (*per Parke, B.*), "The executrix of Solari ought to have known, and probably did, that the company had cancelled the policy, and was making a mistake in paying again. If so, there was no real intention to enrich her. So here: *Waring and Gillow, Ltd.*, must be taken to have known that *Jones, Ltd.*, were not their debtors. If so, and without more, there was no intention of making the £5,000 theirs in any event."

<sup>3</sup> [1943] A.C., at 61, 62, citing *Holmes v. Hall* (1704), Holt 36; 6 Mod. 161. See Jackson, *The History of Quasi-Contract in English Law* (1936), 43, 84.

<sup>4</sup> [1943] A.C., at 62.

<sup>5</sup> (1760), 2 Burr. 1005. The question was whether the plaintiff could recover for money had and received, or must bring a special action upon the contract. The facts were admitted. Moses had endorsed to Macferlan four promissory notes made to Moses by Chapman Jacob for value received in order to enable Macferlan to recover in his own name against C.J. Before endorsing the notes, Macferlan assured Moses that his endorsement "should be of no prejudice to him," and signed an agreement that Moses should not be liable and should not be prejudiced by such endorsement. Nevertheless, Macferlan summoned Moses into the court

this action (*sc. indebitatus assumpsit*) founded in the equity of the plaintiff's case, as it were, upon a contract ('*quasi ex contractu*,' as the Roman law expresses it)."<sup>1</sup>

Lord Mansfield had "sought to rationalise the action for money had and received"<sup>2</sup> and gave typical illustrations:—

"It lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition (express, or implied); or extortion, or oppression, or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances. In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money."<sup>3</sup>

Lord Mansfield did not say—Lord Wright points out—that the law implies a *promise*<sup>4</sup>—

of conscience as the endorser of each note. That court rejected the defence setting up the agreement, and gave judgment against Moses on "the mere fact of his endorsement." He paid the money into court and Macfarlan took it out. Moses then brought an action before Lord Mansfield at *nisi prius* where a verdict was found for him, subject to the opinion of the court, whether the money could be recovered in the present form of action or must be recovered by an action brought on the special agreement. Lord Mansfield took time to advise. "The first objection was that where *debt* would not lie, as here, *assumpsit* would not lie. For this there was no foundation (ib. at 1008). The second objection was that no *assumpsit* lies except upon express or implied contract: here no contract could be presumed. The answer given is quoted in the text.

<sup>1</sup> 2 Burr, at 1008.

<sup>2</sup> [1913] A.C., at 62.

<sup>3</sup> *Id.*, at 1012. The actual decision in *Moses v. Macfarlan* is regarded as wrong. Money paid under compulsion of legal process cannot be recovered. See *Shientag*, *op. cit.*, 135, note 84, citing, *inter alia*, Holdsworth, *History of English Law*, vol. 12, 545, 546, *Marnott v. Hampton* (1797), 7 T.R. 269, *Phillips v. Hunter* (1795), 2 H. Bl. 414. Lord Mansfield did not draw a distinction between money paid under a mistake of *law* and money paid under a mistake of *fact*, Jackson, 59. See Winfield, *Quasi Contract arising from Compulsion* (1944), 60 L.Q.R. 341-355, at 342, note 10.

Following a recommendation by the New York State Law Revision Commission in 1942, a new section was added to Civil Practice Act, s. 112 (f) (*Shientag*, 136, note 85).

"Relief against mistake of law. When relief against mistake is sought in an action or proceeding or by way of defense or counterclaim, relief shall not be denied merely because the mistake is one of law rather than one of fact."

In America the trend has been to follow Lord Mansfield. The *Restatement of Restitution* sets forth a "definite system of rules just like the rules of contract or tort. The basis of the remedy, whether at law, or in equity (by way of constructive trust, equitable lien or subrogation) is the restitution by the defendant of what would be, if not restored, an unjust enrichment" (*op. cit.*, 137).

<sup>4</sup> [1943] A.C., at 62. For the meaning of "*obligation*," see *Preface*, Hazeltine, in Jackson, xvii. And see Jackson, 129:—

"The essence of contract has thus come to be agreement whilst the essence of quasi-contract has remained a duty imposed by law irrespective of agreement."

"Contract" was not treated comprehensively until 1807; only in 1859 did the first treatise on "*Tort*" appear; *Leavey & Scott*, in 54 L.Q.R. 33. For a short account of the main works on quasi-contract, see *ib.*, at 34.

"The law implies a debt or obligation which is a different thing. In fact, he denies that there is a contract. The obligation is as efficacious as if it were upon a contract. The obligation is a creation of the law, just as much as an obligation in tort . . . The obligation belongs to a third class, distinct from either contract or tort, though it resembles contract rather than tort."<sup>1</sup>

Lord Mansfield's statement, despite criticism, remains :

"Like all large generalisations, it has needed and received qualifications in practice. . . . The standard of what is against conscience in this context has become more or less canalised or defined; but in substance the juristic concept remains as Lord Mansfield left it."<sup>2</sup>

(b) To prevent "unjust enrichment"

The gist of the action is "a debt or obligation implied, or more accurately, imposed by law in much the same way as the law enforces as a debt the obligation to pay a statutory or customary impost."<sup>3</sup> *Indebitatus assumpsit* involved at least

<sup>1</sup> See note 4, *supra*, at p. 643.

<sup>2</sup> *Ib.*, at 62, 63. For a critique of *Moses v. Macferlan*, see Winfield, 127-135. *Indebitatus assumpsit*, applied, after *Slade's Case* (1601), 4 Rep. 94a, to "every contract executory" including a contract genuinely implied. It was later extended at the beginning of the eighteenth century—not without a struggle—to include a contract "implied by law" (Winfield, 124). Holt, C.J., was critical: "the notion of promises in law was a metaphysical notion, for the law makes no promise where there is a promise of the party": *Stärke v. Cheeseman* (1699), 1 Ld. Raym. 538. Lord Mansfield rescued quasi-contract from "the marsh of technicality" (Winfield, 127). He gave it "a new centre of gravity." The test he set up was "nebulous" and its application difficult, yet it was "a great improvement on the theory of fictitious contract." "*Ex aequo et bono*" and "natural justice" were a "source of confusion" and were difficult to apply (at 128). *Aequum et bonum* has no reference to "equity," but means what is "fair and reasonable" (at 130, citing *Sinclair v. Brougham* [1914] A.C. 398, 417, *per* Viscount Haldane, L.C., and at 454-456, *per* Lord Sumner; Hanbury (1924), 40 L.Q.R. 34-36).

The principle was severely criticised by Lord Sumner (when Hamilton, L.J.) in *Baylis v. Bishop of London* [1913] 1 Ch., at 140, and by Scrutton, L.J., in *Holt v. Markham* [1923] 1 K.B., at 513 (Winfield, 132).

Professor Winfield observes, however, that a judge must often decide what is "reasonable," and "what does 'reasonable' mean if it does not connote *aequum et bonum*, or, 'justice as between man and man'?" (at 133). Lord Sumner, he thinks, meant that "the main heads of quasi-contract have become so well settled that there is much less room for exercising in it the purely creative side of judicial discretion . . ." (at 134). "But it does not follow that no instances can occur nowadays in the law of quasi-contract in which the judges must fall back upon 'natural justice,' *aequum et bonum*, or 'justice as between man and man,' loose and ambiguous as these phrases may be" (*ib.*).

Mr. Justice Shientag, in *Lord Mansfield Revisited*, devotes an illuminating section to *quasi-contract*: "In his decisions on this subject he left his eternal mark on the law" (*Moulders of Legal Thought*, 133).

<sup>3</sup> *Ib.*, at 63, citing *Bullen and Leake* (1868), 3rd ed., 30: "There is therefore but one form of *indebitatus* count, which comprises all the advantages of both forms under the old procedure [*sc. of debt and assumpsit*]; and the action of *indebitatus assumpsit* is virtually become obsolete."

two averments; the debt and the promise. The debt was the real cause of action; the promise was fictitious but necessary to enable the "convenient and liberal form of action" to be used. Since the Common Law Procedure Act, 1852, "this fictitious *assumpsit* or promise was wiped out."<sup>1</sup> Lord Atkin, in *The United Australia Case*, observes of the blackmailer:—

"The man has my money which I have not delivered to him with any real intention of passing to him the property. I sue him because he has the actual property taken . . . These fantastic resemblances of contracts invented in order to meet requirements of the law as to forms of action which have now disappeared should not in these days be allowed to affect actual rights. When these ghosts of the past stand in the path of justice clanking their mediæval chains the proper course for the judge is to pass through them undeterred."<sup>2</sup>

Yet, Lord Wright continues, "the ghosts of the forms of action have been allowed at times to intrude in the ways of the living and impede vital functions of the law."<sup>3</sup> Thus, in *Sinclair v. Brougham*,<sup>4</sup> Lord Sumner had said that actions for money had and received "rest, and long have rested, upon a notional or imputed promise to repay." The statement was *obiter*, and was "only a way of describing a debt or obligation arising by construction of law.

The claim for money had and received always rested on a debt or obligation which the law implied or more accurately imposed, whether the procedure actually in vogue at any time was debt or account or case or *indebitatus assumpsit*.

<sup>1</sup> See note 3, *supra*, at p. 644.

<sup>2</sup> *United Australia, Ltd. v. Barclays Bank Ltd.* [1941] A.C.1, 29. See Lord Wright's *Essay* (1941), 57 L.Q.R. 184-202, at 184, 185.

<sup>3</sup> [1943] A.C., at 63, 64.

<sup>4</sup> [1914] A.C. 398, 452. See Lord Wright, *Legal Essays and Addresses*, 1-33. The case was "primarily significant upon the leading principles of the equitable jurisdiction of the court in relieving against unjust enrichment or to achieve restitution" (at 1). A building society engaged in banking, borrowed money *ultra vires*; it incurred heavy losses and went into liquidation. The depositors could not rank as creditors. No claim lay for money lent or for repayment in quasi-contract. Since the money was not *identifiable*, but was inextricably mixed with other money, the court granted the equitable remedy of a "tracing order." That the shareholders should be enriched at the depositors' expense was unreasonable. The assets, after outside creditors were paid, were ordered to be divided *pari passu* among shareholders and depositors in the proportion of their contributions; since there had been a loss it should be borne equally (at 4, 5).

"The importance of the case is that it demonstrates a category of claims distinct from contract, or tort, or trust . . . the essential principle of which is that the defendant should not be unjustly enriched at the expense of the plaintiff. The test of recovery is not the loss to the plaintiff, but the gain to the defendant, though in general the loss fixes a limit. Emphasis is to be placed on the word "unjustly" (at 2, 3).



Even the fictitious *assumpsit* disappeared after the 1852 Act."<sup>1</sup>

Lord Wright preferred Lord Sumner's explanation in *Jones' Case*.<sup>2</sup> Lord Sumner's words had not "closed the door to any theory of unjust enrichment in English law."<sup>3</sup> The action for money had and received is still used

"as a practical and useful, if not complete or ideally perfect, instrument to prevent unjust enrichment, aided by the various methods of technical equity which are also available as they were found to be in *Sinclair v. Brougham*."<sup>4</sup>

(c) "*Failure in Contract Performance*"

Must the court stay its hand in an ordinary case for the repayment of money paid in advance on account of the purchase price, merely because *through impossibility of performance*, the consideration has failed?

"The defendant has the plaintiff's money. There was no intention to enrich him in the events which happened. No doubt, where money is paid under a contract, it can only be claimed back as for failure of consideration where the contract is terminated as to the future."<sup>5</sup>

For example: Where the contract is dissolved by frustration or impossibility, or becomes abortive without fault on the part of the plaintiff, where the consideration "if entire, has entirely failed, or where, if it is severable, it has entirely failed as to the severable residue."<sup>6</sup>

<sup>1</sup> [1943] A.C., at 64, *per* Lord Wright. Had Lord Sumner, on those days, Lord Wright asks (1941), 57 L.Q.R. 799, 200 —' for the moment by accident omitted to notice the Acts of 1852 and 1873? If so, what he said could not constitute a precedent, even if it had been what it was not, anything more than mere observation. In the *London Street Tramways Co. v. London County Council* [1891] A.C. 375, 380, Lord Halsbury observed that an omission of this nature would constitute a mistake of fact and the court would be bound to act upon the law as they found it. I regret that these dicta are still quoted by learned authors and by judges. But I trust the opinions of the Lord Chancellor and Lord Atkin "sc. in the *United Australia Case* [1941] A.C. 1]" will end that practice."

See also *Young v. Bristol Aeroplane Co., Ltd.* [1944] 1 K.B. 718, 729, 730, *per* Lord Greene, M.R. (speaking of the jurisdiction of the Court of Appeal): —

"... Where the court is satisfied that an earlier decision was given in ignorance of the terms of a statute or a rule having the force of a statute the position is very different. It cannot, in our opinion, be right to say that in such a case the court is entitled to disregard the statutory provision and is bound to follow a decision of its own given when that provision was not present to its mind."

The exception is thus summarised:—

"(3) The court is not bound to follow a decision of its own if it is satisfied that the decision was given *per incuriam*."

<sup>2</sup> [1926] A.C. 670, 696: "there was no real intention on the company's part to enrich her" (*sc.* Solari's executrix in *Kelly v. Solari* (1841), 9 M. & W. 54, 58).

<sup>3</sup> [1943] A.C., at 64.

<sup>4</sup> *Ib.*, at 64, 65, citing *Rugg v. Minett* (1809), 11 East 210, 218; *supra*, 636.

"The claim for repayment is not based on the contract which is dissolved on the frustration, but on the fact that the defendant has received the money and has in the events which have supervened no right to keep it. The same event which automatically renders performance of the consideration for the payment impossible, not only terminates the contract as to the future, but terminates the right of the payee to retain the money which he has received only on the terms of the contract performance."<sup>1</sup>

Neither upon rescission nor upon frustration is the contract "wiped out or avoided *ab initio*."

"The right in such a case to claim repayment of money paid in advance must in principle, in my judgment, attach at the moment of dissolution. The payment was originally conditional. The condition of retaining it is eventual performance. Accordingly, when that condition fails, the right to retain the money must simultaneously fail. It is not like a claim for damages for breach of the contract, which would generally differ in measure and amount, nor is it a claim under the contract. It is in theory and is expressed to be a claim to recover money received to the use of the plaintiff."<sup>1</sup>

Claims have been entertained for recovery of money paid where the contract had come to an end after the money was paid. Deposits have been recovered—even under a contract by deed for the purchase of an estate.<sup>2</sup> The failure of the

<sup>1</sup>[1943] A.C., at 65. Lord Wright quote Lord Haldane, L.C., in *Royal Bank of Canada v. R.* [1913] A.C. 283, 296: "It is a well-established principle of the English common law that when money has been received by one person which in justice and equity belongs to another, under circumstances which render the receipt of it a receipt by the defendant to the use of the plaintiff, the latter may recover as for money had and received to his use. The principle extends to cases where the money has been paid for a consideration that has failed." Lord Haldane refers to the judgment of Brett, L.J., in *Wilson v. Church* (1879), 13 Ch. D. 1, 49: money had been paid to borrowers in consideration of a scheme to be carried out after payment; the scheme became abortive, the lender could claim the return of the money as held to his use (affirmed *sub nom. National Bolivian Navigation Company v. Wilson* (1880), 5 A.C. 176, 185, per Earl Cairns, L.C.). Lord Wright analyses *Ashpitel v. Seacombe* (1850), 5 Ex. 147, 162, citing from the judgment of Patteson, J.: "There seems no doubt that the plaintiff, having paid his money for shares in a concern which never came into existence, or a scheme which was abandoned before it was carried into execution, paid it on a consideration which has failed, and may recover it back as money had and received to his use, unless he can be shown to have consented to or acquiesced in the application of the money which the directors have made." *Johnson v. Goslett* (1857), 3 C.B. (n.s.) 569, 594, is also cited.

<sup>2</sup>[1943] A.C., at 67, citing *Greville v. Da Costa* (1797), Peake Add. Cas. 113, 114. Where A agreed to sell an estate to B and the Lord Chancellor afterwards ordered a resale, Lord Kenyon held that, even though the contract was under seal, B might rescind the contract and bring an action for money had and received, to recover back his deposit. "The defendant held this money against conscience, and therefore might be compelled to refund it by an action for money had and received." See the reporter's note.

consideration need not be due to the defendant's breach of contract or misconduct.

"Impossibility of performance or frustration is only a particular type of circumstance in which a party who is disabled from performing his contract is entitled to say that the contract is terminated as to the future and in which repayment of money paid on account of performance may be demanded."<sup>1</sup>

(d) *Where Contract includes repayment*

The contract, however, may expressly or by necessary implication exclude repayment even though the consideration fails. Thus, *advance freight* is not recoverable if delivery is prevented by act of God, perils of the seas, or other excepted cause: "The irrecoverable nature of the payment is there determined by custom or law, unless the contract provides for the contrary."<sup>2</sup>

In the present case the prepayment was not irrecoverable by custom or rule of law or by express or implied terms of the contract: "It was paid on account of the price. It was not paid out-and-out for the signing of the contract."<sup>3</sup>

(e) *Chandler v. Webster criticised*

In *Chandler v. Webster*<sup>4</sup> Sir Richard Henn Collins, M.R., "ignored the principles and authorities upon the action for money had and received . . . though the claim was to recover as on a total failure of consideration."<sup>5</sup> His prepayment the hirer should have recovered; he should have been exonerated from liability for the balance.

"The claim for money had and received is not, in my opinion, a claim for further performance of the contract. It is a claim outside the contract. If the parties are left where they are, one feature of the position is that the one who has received the prepayment is left in possession of a sum of money which belongs to the other. The frustration does not change the property in the money; nor is the contract wiped out altogether, but only the future performance."<sup>6</sup>

Sir Richard Henn Collins, M.R., had referred to the difficulty of constructing a hypothetical contract and of working out what the rights of the parties should be. "This way of envisaging the matter," said Lord Wright, did not "accord with the true position."<sup>6</sup>

<sup>1</sup> [1943] A.C., at 67. See Williston, s. 1974, *infra*, 701.

<sup>2</sup> *Ib.*, citing *Anon* (Case 271) (1683), 2 Shower 283, *per* Saunders, C.J.; *Byrne v. Schuller* (1871), L.R. 6 Ex. 319, 327, *per* Montague Smith, J.; *Allison v. Bristol Marine Insurance Company* (1875), 1 A.C. 209, 253, *per* Lord Selbourne.

<sup>3</sup> [1943] A.C., at 67, 68. <sup>4</sup> [1904] 1 K.B. 493, 499. <sup>5</sup> [1943] A.C., at 69.

<sup>6</sup> *Ib.*, at 70.

"As frustration is automatic, so equally the claim for money had and received here follows automatically."<sup>1</sup>

Lord Wright points out that *Chandler v. Webster*,<sup>2</sup> has been criticised by Williston<sup>3</sup> and is not adopted in *The Restatement*.<sup>4</sup> The law of the United States seems, moreover, "to go beyond the mere remedy of claims for money had and received and allow the recovery of the value of the benefit of any part performance rendered while performance was possible."<sup>5</sup> How far such a claim has been admitted in English Law was "not clear." How far, if at all, it was open in English law that "the payer who has paid in advance should give credit to the extent that he is *lucratus* by any part performance," Lord Wright refrained from discussing.<sup>6</sup> By "*failure of consideration*," both English and Scots law mean "a failure in the contract performance."

#### (f) *Imperfections of the Law*

The recipient, however, may be exposed to hardship if he has to return the money although he has incurred the bulk of the expense and has the goods on his hands. The English rule works but "a rough justice":

"It was adopted in more primitive times and was based on the simple theory that a man who has paid in advance for something which he has never got ought to have his money back. It is further imperfect because it depends on an entire consideration and a total failure. Courts of equity have evolved a fairer method of apportioning an entire consideration in cases where a premium has been paid for a partnership which has ended before its time: Partnership Act, 1890, s. 40<sup>7</sup>; contrary to the common law rule laid down in *Whincup v. Hughes*.<sup>8</sup> Some day the Legislature may intervene to remedy these defects."<sup>9</sup>

#### (g) *When Established Doctrine may be reversed*

Upon the argument that the House should not reverse a doctrine which had stood since 1904, Lord Wright observed:—

"If the doctrine is, as I think it clearly is, wrong and unjust, it is the duty of this House, exercising its function of finally declaring the law, to reverse it, unless there are

<sup>1</sup> [1943] A.C., at 71.

<sup>2</sup> [1904] 1 K.B. 493.

<sup>3</sup> Section 1954, p. 5477; s. 1974, p. 5544; *infra*, 697, 698, 701.

<sup>4</sup> Section 468, pp. 884 *et seq.*

<sup>5</sup> [1943] A.C., at 71.

<sup>6</sup> *Ib.*, at 72. Referring to the passage quoted by Earl of Birkenhead in *The Cantuare Case* [1924] A.C. 226, 237, 238, from Lord President Inglis' "celebrated judgment" in *Watson & Co. v. Shankland* (1871), 10 M. 142, 152.

<sup>7</sup> See Pollock, *A Digest of the Law of Partnership* (1944), 14th ed., for the cases; Lindley, *A Treatise on the Law of Partnership* (1935), 10th ed., 684–690.

<sup>8</sup> (1871), L.R. 6 C.P. 78. For the facts and the judgments, see *infra* 675.

<sup>9</sup> [1943] A.C., at 72. See Chaps. XXVI, XXVII, *infra*.

very special circumstances such as were recently considered in *Admiralty Commissioners v. Valverde*.<sup>1</sup> On the other hand, in *Lissenden v. Bosch*,<sup>2</sup> the House has recently overruled a decision which had been acted upon in frequent practice for twenty-seven years.<sup>3</sup>

#### 6. LORD ROCHE: CONTRACT, THE "CRUCIAL OR FINAL" MATTER

"In cases of frustration," said Lord Roche, "the loss does lie where it falls, but this means where it falls having regard to the terms of the contract between the parties."<sup>4</sup> If the payment is "absolute or final or out-and-out," it is not recoverable. Payment of *advance freight* is a payment of this nature. Thus also, payment of hire under a hire-charterparty. *Matthew, L.J.*—"a supreme master of the common law"<sup>5</sup>—based his judgment in *Chandler v. Webster*<sup>6</sup> on the "finality of the payment." If those payments were final, they were not recoverable; the consideration for such payments would not wholly have failed.<sup>5</sup>

On the other hand, it is "well settled," that, subject to the special provisions of a contract, "payments on account of a purchase price are recoverable if the consideration for which

<sup>1</sup> [1938] A.C. 173, 194. The Admiralty's claim for salvage service failed on the ground that a salvage agreement could not override the statutory prohibition.

"This House has no doubt power to overrule even a long established course of decision of the courts, provided it has not itself determined the question. It is impossible to lay down precise rules according to which the power will be reversed. But, in general, this House will adopt this course only in plain cases where serious inconvenience or injustice would follow from perpetuating an erroneous construction or ruling of law. This is not such a case."

Contrast *In re Warden & Holzkiss, Ltd.* (1945), 61 T.L.R. 296, 297, 298, *per* Scott and Morton, L.J.J., and Cohen, J.

<sup>2</sup> [1940] A.C. 412. The House overruled a decision of the Court of Appeal acted upon since 1913: they had held that if an appeal against an award of Workmen's Compensation was desired, no money must be accepted (at 431).

"But notwithstanding that the decision has been followed so long and so often, and has no doubt become regarded in certain quarters as an established rule, this House has the duty to reconsider it when at last it is brought before it and to set it aside if it is seen to be contrary to justice and convenience."

"Convenience," says Lord Wright,

"I use as meaning not a mere opportunism or narrow practicability, but a wise regard to practical consideration, as contrasted with a cramped or formalistic logic. Perhaps it was something like this which Holmes had in mind when he said that experience and not logic was the life of the law, or when he said that judges must think facts, not words. He may have meant that law is not a self-contained system of rules and concepts, "*dominans in vacuo*," but a function of human life, only capable of justifying itself in so far as it meets the requirements of men and affairs" (*Legal Essays and Addresses*, xvii, xviii).

<sup>3</sup> [1943] A.C., at 73.

<sup>4</sup> *Ib.*, at 74.

<sup>5</sup> *Ib.*, at 75.

<sup>6</sup> [1904] 1 K.B. 493, 502.

that price is being paid wholly fails."<sup>1</sup> In the present case, the sum sued for was "of this provisional nature"—part of a lump sum price, a payment on account of the price. It afforded security that *Fibrosa* would implement this contract and provided the sellers with finance for manufacture. If no machines or documents of title were delivered, the consideration for the price wholly failed and the payment on account was recoverable.

"At all events, parties to contracts will know that as the law stands the contract between them is the matter of crucial or final importance, and that if, as may very well be the case in time of war or impending war, frustration of their contracts is to be apprehended, they may make what contracts they think fit to provide in that event for the adjustment of the position between them."<sup>2</sup>

LORD PORTER: "LOSS LIES WHERE IT FALLS",  
TRUE MEANING

In English Law, Lord Porter said—

"... money had and received to the plaintiff's use can undoubtedly be recovered in cases where the consideration has wholly failed, but unless the contract is divisible into separate parts it is the whole money, not part of it, which can be recovered. If a divisible part of the contract has wholly failed and part of the consideration can be attributed to that part, that portion of the money so paid can be recovered, but unless this be so there is no room for restitution under a claim in *indebitatus assumpsit*. A partial failure of consideration gives rise to no claim for recovery of part of what has been paid."<sup>3</sup>

Upon frustration, no "right to recover some equitable sum" could be implied in English authority or principle.<sup>4</sup>

The doctrine that money paid in advance under a contract which is afterwards frustrated cannot be recovered seems to originate with the "coronation cases."<sup>5</sup> The doctrine as there

<sup>1</sup> [1943] A.C., at 75, citing *Ockenden v. Henly* (1856), E.B. & E. 485, 492, 493. A purchaser at an auction did not pay the deposit or complete the purchase. Under the conditions his deposit was forfeited. The plaintiff resold at a lower price than that for which the defendant bought, and the deficiency and expenses exceeded the amount of the deposit. The plaintiff recovered the deficiency and expenses, but not the deposit.

<sup>2</sup> [1943] A.C., at 76.

<sup>3</sup> *Ib.*, at 77.

<sup>4</sup> *Ib.*, at 78.

<sup>5</sup> *Ib.*, 79, 80. In *Stubb's v. Holywell Railway Company* (1867), L.R. 2 Ex. 311, *Whincup v. Hughes* (1871), L.R. 6 C.P. 78, and *Anglo-Egyptian Navigation Company* (1875), L.R. 10 C.P. 271, 283, the consideration was partly performed.

In *Stubb's Case*, the company employed S as consulting engineer for fifteen months to complete certain work; he was to be paid £500 for his services in equal quarterly instalments. Before the work was finished, two instalments being due but unpaid, he died; these his representatives were entitled to recover.

In *Anglo-Egyptian Navigation Case* (1875), L.R. 10 C.P. 271, 283, 284, R

stated appears to be confined to the "termination of contracts by excusable impossibility."<sup>1</sup> It is unsupported by authority or in principle. The true view was expressed by Brett, L.J., in *Wilson v. Church* :—

"... where money is paid for a consideration which is to be performed after the payment, if that consideration wholly fails, the money becomes money in the hands of the borrowers held to the use and for the benefit of the lenders, and must be returned."<sup>2</sup>

These were cases of borrowed money and there was fault in the borrower, but the decision did not turn on "so narrow a ground." The principle may be illustrated by ss. 6 and 7 of the Sale of Goods Act, 1893. Where the goods perish *before* the agreement for sale, the contract is void *ab initio*. Where the goods perish *after* the contract has been made, it is not void *ab initio*, but further performance is excused. Yet the price is returnable because the consideration has *wholly* failed "without fault on either side."<sup>3</sup>

This is the *general* rule. But the payer may pay not for performance of the promise, but for the promise—"not for the doing of something but for the chance that it may be done."<sup>4</sup>

It had been argued that no recovery was possible except where the recipient was in fault. For this proposition there was no authority; it was contrary to *Knowles v. Bovill*.<sup>5</sup> The contracted to supply machinery and boilers for a steamship of the company. The price was £5,800, to be paid in specified amounts at specified stages on certificate of the company's inspector. One instalment of £2,000 had been paid; the machinery was ready to be fixed when the ship was lost by perils of the sea. The company paid another instalment of £2,000 knowing that the ship was lost; the defendant was unaware of that fact. The company claimed delivery of the machinery or the recovery of £4,000. The contract was entire, it was held, and indivisible; the property did not pass until the machinery was fixed. The company was not entitled to the machinery, nor could it recover the £4,000.

<sup>1</sup> [1943] A.C., at 81.

<sup>2</sup> (1879), 13 Ch. D. 1, 49, 50; affirmed (1880), 5 A.C. 176; approved by Lord Haldane, L.C., in *Royal Bank of Canada v. R.* [1913] A.C. 283, 296.

<sup>3</sup> [1943] A.C., at 82.

<sup>4</sup> *Ib.*, at 82. This, says Lord Porter, was Mathew, L.J.'s view in *Chandler v. Webster* [1904] 1 K.B. 493, 502; *supra*, 598.

<sup>5</sup> (1870), 22 L.T. 70. K held a licence from the patentee to use an invention. The patentee intended to apply for a prolongation of the patent and also for a patent for a new and similar invention. K agreed to give him £150 for the free use for ever of the former patent and for the free use for three years of the new patent. The £150 was paid, but the patentee died, and no application was ever made. K recovered from his executors the £150 on the ground that the consideration had wholly failed. He had bought the right to have an application made, not merely the right to the benefit of it, if it should happen to be made.

"The true test in this case is the question, What did he buy? In my opinion he bought an application for the grant of one patent and the prolongation of the other. By the contract he was to take the chance of the failure or success of such application. But what he bought was an application. The result is that the consideration in this case wholly fails because it is admitted such application never was and now never will be made": *per* Martin, B. (at 74).

consideration mostly fails because one party or the other is in breach. "But it is not the breach but the failure of consideration which enables money paid in advance to be recovered."<sup>1</sup>

The payment of the £1,000 in advance was not a "final payment"; this was a question of construction depending on the words of the particular contract. The case came within s. 7 of Sale of Goods Act, 1893: had the goods been destroyed by enemy action the advance portion of the price would have been recoverable.

"I think it is true to say that the loss lies where it falls, but that expression only means that the rights of the parties are to be determined at the moment when impossibility of further performance supervenes. If at that moment the party who has advanced money is by the ordinary rules of the common law entitled to say that the consideration has now wholly failed, he can, in my view, enforce the rights given by those rules and recover the money."<sup>2</sup>

*Note.*—See *Note* (1942), 56 Harv. L. Rev., 307, 308, which describes the *Fibrosa* decision as a "pronounced departure from the doctrine of 'implied conditions,' which had been resorted to when the courts found it unconscionable to hold parties to their promises in cases of impossibility." The decision, placed on the ground of failure of consideration, it was hoped, would do much "to destroy the hardy but mischievous fiction of 'implied conditions.'"

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<sup>1</sup> [1943] A.C., at 83.

<sup>2</sup> *Ib.*, at 83, 84.



## CHAPTER XXV

### CONCERNING QUASI-CONTRACT

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#### A. THE SIGNIFICANCE OF FIBROSA

##### 1. *Judicial Legislation*

THE *Fibrosa* decision<sup>1</sup> was judicial legislation. New law it is although the principle applied was old. What could be simpler than to say: a total failure of consideration has occurred and money prepaid can be recovered?

"What is now being decided, Lord Atkin said, "is that the application of an old-established principle of the common law does enable a man who has paid money and received nothing for it to recover the money so expended."<sup>2</sup>

So simple indeed—in retrospect—it all appeared that the House of Lords could not understand how Sir Richard Henn Collins decided otherwise: what warrant for his rule that "the doctrine of failure of consideration only applies where the contract is wiped out altogether?"<sup>3</sup> Thus, Viscount Simon, L.C.<sup>4</sup> Lord Atkin queried, "how this great lawyer came to the conclusion: I know of no authority for the proposition."<sup>5</sup> In Lord Wright's view, money prepaid "no

<sup>1</sup> [1943] A.C. 32. Chap. XXIV, *supra*.

<sup>2</sup> *Ib.*, at 55; *supra*, 639.

<sup>3</sup> *Chandler v. Webster* [1904] 1 K.B. 493, 499; *supra*, 597.

<sup>4</sup> *The Fibrosa Case* [1943] A.C. 32, 47, 48; *supra*, 634, 635.

<sup>5</sup> *Ib.*, at 52; *supra*, 637.

doubt . . . can only be claimed back as for failure of consideration where the contract is *terminated as to the future*.<sup>1</sup> Lord Collins' proposition, observed Lord Roche, is "erroneous in law and unsupported by any authority binding on this House."<sup>2</sup> "I can find no principle to support it," said Lord Porter.<sup>3</sup> This is clearly a misapprehension on the part of the learned judge,<sup>4</sup> Lord Russell of Killowen thought. The distinction, Lord Macmillan declared, has "no basis in principle or precedent."<sup>5</sup>

True, the proposition had been left open by the Earl of Birkenhead in the *Cantiare Case*<sup>6</sup>: Pollock had criticised it,<sup>7</sup> and Lord Atkin, when in the Court of Appeal, had made unfavourable comment.<sup>8</sup> That such was the law, however, had been tacitly assumed in the terms of reference, and in the recommendations, of the Law Revision Committee: if *Chandler v. Webster*<sup>9</sup> was wrong, were not the terms of reference both ambiguous and premature? Moreover, Lord Collins' proposition had been in terms accepted and restated by eminent judges. Atkin, L.J., in the *Russkoe Case*,<sup>10</sup> did not cast doubt upon it. Lord Sumner, in *The French Marine Case*,<sup>11</sup> quoted with approval from the judgment of Collins, M.R., in *Elliott v. Crutchley*,<sup>12</sup> and Lord Parmoor, in the same case, restated the principle clearly and at length.<sup>13</sup> In *The Cantiare Case*, Lord Parmoor's restatement was referred to by Viscount Finlay with apparent approval.<sup>14</sup> Viscount Finlay's observation was *obiter*, and the principle was no part of the decision in the *French Marine Case*<sup>15</sup>: such unanimity, nevertheless, is highly significant.

Lord Wright himself, in 1936, extra-judicially declared:—

"It may be that legislation would in any case be necessary to give full effect to a scientific theory, as legislation would certainly be necessary if certain desirable reforms are to be effected . . . Again, the English law should be brought into harmony with Scots law, which was discussed in *The Cantiare Case*.<sup>16</sup> . . . By English law the payee is entitled to keep what he has received, so long as he received it before the contract was discharged. In Scotland it is treated as a case of unjust

<sup>1</sup> [1943] A.C. at 64; author's italics. <sup>2</sup> *Ib.*, at 73.

<sup>3</sup> *Ib.*, at 81; *supra*, 652.

<sup>4</sup> *Ib.*, at 57.

<sup>5</sup> *Ib.*, at 60.

<sup>6</sup> [1924] A.C. 226, 233; *supra*, 612.

<sup>7</sup> *Contract*, 10th ed., 297, *Note*.

<sup>8</sup> *The Russkoe Case* (1922), 10 Ll. L. Rep. 214, 216, 218; *supra*, 606, 607.

<sup>9</sup> [1904] 1 K.B. 493; *supra*, 596–598.

<sup>10</sup> (1922), 10 Ll. L. Rep. 214, 216, 217; *supra*, 606, 607.

<sup>11</sup> [1921] 2 A.C. 493, 519.

<sup>12</sup> [1904] 1 K.B. 565, 568; *supra*, 597, note 6.

<sup>13</sup> [1921] 2 A.C. 493, 523.

<sup>14</sup> [1924] A.C. 226, 241; *supra*, 614.

<sup>15</sup> See *per* Lord Wright in *The Fibrosa Case* [1942] A.C. 42, 71.

<sup>16</sup> [1924] A.C. 226.

enrichment ; in England it is treated as a case of an accrued right."<sup>1</sup>

## 2. *The Law before Fibrosa*

What then, is the true explanation of Lord Collins' rule ?

### (a) *Judicial Dicta*

Lord Collins' proposition had not been judicially questioned, because, until *The Fibrosa Case*, it was regarded as correct.

"No doubt the general rule is that a buyer cannot rescind a contract of sale and get back the purchase-money *unless he can restore the subject-matter*," Scrutton, L.J., had observed.<sup>2</sup>

This is borne out by the older cases. Where an agreement was executed in part, it could not be rescinded :

"Now where a contract is to be rescinded at all," Lord Ellenborough, C.J., said in the King's Bench, "it must be rescinded *in toto*, and the parties put in status quo."<sup>3</sup>

Similarly, in the Exchequer Chamber, Vaughan, B., declared :—

"The decision in *Hunt v. Silk* lays down a very clear and just rule in these cases : if the circumstances be such that, by rescinding the contract, the rights of neither party are injured, in that case, if one contracting party will not fulfil his part of the engagement, the other may rescind the contract, and maintain his action for money had and received, to recover back what he may have paid upon the faith of it."<sup>4</sup>

And, in a later day, Martin, B., observed :—

"... the contract cannot be rescinded unless the parties can be restored to their original condition. But if one party has done an act by reason of which it has become impossible to put the other in the same situation as before, there can be no rescission, and the remedy, if any, must be on the contract."<sup>5</sup>

These cases concern rescission ; frustration of contract is a comparatively recent development. But their importance is this : *the plaintiff only got his money back if the parties could be restored to their former position*. This, upon frustration, was clearly impossible : that is why Collins, M.R., had no doubt.

### (b) *The Text Writers*

The same point is made by the text writers. Speaking of recovery upon a *total failure of consideration* as a "pure quasi-contract," Professor Winfield says :—

<sup>1</sup> *Legal Essays and Addresses*, 327-386, at 359, 360. Lord Wright did not here cast doubt upon *Chandler v. Webster*. The point, however, may be that legislation was necessary "to give full effect to a scientific theory"; *Fibrosa* was the first stage to the Law Reform (Frustrated Contracts) Act, 1943.

<sup>2</sup> *Rowland v. Divall* [1923] 2 K.B. 500, 505 ; author's italics.

<sup>3</sup> *Hunt v. Silk* (1804), 5 East 449, 452 ; author's italics.

<sup>4</sup> *Reed v. Blandford* (1828), 2 Y. & J. 278, 284.

<sup>5</sup> *Freeman v. Jeffries* (1869), L.R. 4 Ex. 189, 200.

"The modern theory, now long settled, is that the contract is *totally rescinded* in such cases. In fact, *unless that has happened, the action will not lie.*"<sup>1</sup>

Pollock, observing upon "*The Right of Rescission*," that "The contract cannot be rescinded after the position of the parties has been changed, so that the former state of things cannot be restored," observes:—

"The right to recover back money paid under an agreement on the ground of mistake, *failure of consideration*, or default of the other party, is also subject to the same rule."<sup>2</sup>

Keener, an eminent American authority, declares:—

"If the plaintiff is in a position to return what he received, it seems equally clear that a defendant should have a right to insist on a return thereof, as a condition of refunding what he has received under the contract in preference to being credited with the value thereof in an action brought to recover the money received by him under the contract. Accordingly it is held that, as a condition of maintaining an action to recover money so paid, the plaintiff must restore to the defendant what he has received under the contract."<sup>3</sup>

He cites from the judgment of Parke, B., in *Ehrensperger v. Anderson*<sup>4</sup>:—

'In order to constitute a title to recover for money had and received, the contract on the one side must not only not be performed or neglected to be performed, but there must have been something equivalent to saying, 'I rescind this contract,'—a total refusal to perform it, or something equivalent to that which would enable the plaintiff on his side to say, 'If you rescind the contract on your part, I will rescind it on mine.'"

Woodward, of equal authority, and in a more recent exposition, speaking of the law in the United States, says:—

"The right to restitution is said to be subject to the condition that the party seeking to exercise it shall first restore or offer to restore anything that he may have received under the contract. Where, however, it is money that has been received, the rule is frequently not enforced, the plaintiff being permitted to recover the value of his own performance less the amount received by him."<sup>5</sup>

<sup>1</sup> *Province of Tort*, 156; author's italics.

<sup>2</sup> *The Principles of Contract* (1942), 11th ed. (ed. Winfield), 478, 480.

<sup>3</sup> W. A. Keener, *A Treatise on the Law of Quasi-Contracts* (1893), New York, 302.

<sup>4</sup> (1848), 3 Ex. 148, 158.

<sup>5</sup> P. C. Woodward, *The Law of Quasi-Contracts* (1913), Boston, s. 265, 422, 423. See Review by "J. G. P." in (1914), 30 L.Q.R., 242-245, who points out that Woodward treats of quasi-contracts as equitable obligations, founded on "natural justice." The depositors in *Sinclair v. Brougham* would, by American law, have been able to claim as creditors for money had and received.

Woodward—still speaking of the American rule—continues :—

“What if the *res* received by the plaintiff has been lost or disposed of, or if it is something of a nature that cannot be returned, *in specie*, as services, or the protection of insurance, or the use of property? By the weight of authority, except in the case of insurance contracts, restitution is not, under such circumstances, an available remedy.”<sup>1</sup>

He cites *De Montague v. Bacharach*<sup>2</sup> where action was brought to recover money paid for the privilege of running a restaurant in part of a basement of which the defendants were lessees. The plaintiff had conducted the restaurant for ten months; unable to put the defendants in *statu quo*, he could not rescind.

In England, he continues, “this rule that the defendant must be placed in *statu quo* has been so rigidly applied that one who has received the benefit of part performance is rarely in a position to demand restitution. Thus, though he returns property received by him, he will not be permitted to enforce restitution because he has also enjoyed a benefit which cannot be returned *in specie*—the temporary use of the property.”<sup>3</sup>

## B. QUASI-CONTRACT: JUDICIAL DICTA

### 1. Historical; Professor Winfield's Definition

A contract, in essence, is an *agreement*: expressly formulated or implied in the intention or from the conduct of the parties. The obligation to return money when the consideration for paying it has wholly failed, does not arise from agreement between the parties, express or implied, but is imposed by law. This obligation is described as arising *quasi ex contractu* and has been called “quasi-contractual.” Historically, the writ *indebitatus assumpsit* (“the defendant being indebted did promise”)—where the promise to pay was *implied* from the debt<sup>4</sup>—was not only used to enforce claims in contract, but was extended to include claims such as those for money had and received where the consideration had wholly failed. These claims were described as arising out of “*implied contracts*”—i.e., “contracts implied by law”—and were treated as analogous to claims arising out of contract.<sup>5</sup> The use of the writ for this

<sup>1</sup> Woodward, *op. cit.*, 265, 423.

<sup>2</sup> (1902), 181 Mass. 256, 260.

<sup>3</sup> Woodward, *op. cit.*, 265, 425.

<sup>4</sup> “every contract executory imports in itself an *assumpsit*”. *Slade's Case* (1601), 4 Rep. 92b.

<sup>5</sup> Jackson, *op. cit.*, Preface, xxii. And see s. 19, Consideration in *Indebitatus Assumpsit*, and s. 23, *Recovery of Money on Failure of Consideration*, s. 32, *The Name, “Quasi-Contract.”*

See also Jackson, *The Scope of the Term “Contract”* (1937), 53 L.Q.R., 525-536, at 531 *et seq.*

type of claim was well established in Holt's time.<sup>1</sup> "The defendant, being indebted, did promise": the consideration was always the "indebtedness" which might have arisen either out of a contract, e.g., for work and labour or for goods sold and delivered, or independently of a contract, e.g., the obligation to pay a customary due,<sup>2</sup> or to repay money where A has been compelled to pay money which B was by law bound to pay<sup>3</sup>; the obligation of a surety to make contribution<sup>4</sup>; the obligation to return money paid by mistake,<sup>5</sup> or to return money *where the consideration had wholly failed*.<sup>6</sup>

"The nature of a claim for return of money paid on total failure of consideration is peculiar; the payment obviously must have been made in pursuance of a contract, but a claim for repayment cannot rest on that contract, because that contract has *ex hypothesi* ceased to exist. If the claim for repayment cannot rest on the contract it may be regarded as resting on a quasi-contract."

"Genuine quasi-contract" has been described by Professor Winfield as signifying in modern English law

"liability, not exclusively referable to any other head of the law, imposed upon a particular person to pay money to another particular person on the ground of unjust benefit."<sup>7</sup>

Quasi-contracts, Ames declares, are founded upon one of three bases: a record; a statutory, official, or customary duty; or "upon the fundamental principle of justice that no one ought unjustly to enrich himself at the expense of another."<sup>8</sup>

Quasi-contracts are defined in *The Restatement of Contracts* as "Obligations created by law for the sake of justice."<sup>9</sup>

## 2. Lord Mansfield: "Natural Justice"

In *Moses v. Macferlan*<sup>11</sup> Lord Mansfield—in Professor Winfield's words—shifted "the centre of gravity"<sup>12</sup> from "a contract implied by law" to an obligation "in natural justice":

"If the defendant be under an obligation, from the ties of

<sup>1</sup> Jackson, 43, citing *Holmes v. Hall* (1704), 6 Mod. 161. See the speech of Viscount Haldane, L.C., in *Sinclair v. Brougham* [1914] A.C. 398, 416, 417.

<sup>2</sup> Jackson, 44, 45.

<sup>3</sup> Jackson, 51, citing *Exall v. Partridge* (1799), 8 T.R. 308.

<sup>4</sup> Jackson, 55.

<sup>5</sup> Jackson, 58.

<sup>6</sup> Jackson, s. 23, pp. 84-88

<sup>7</sup> Jackson, 86.

<sup>8</sup> Winfield, 119. See Ames, *Lectures on Legal History*, Lecture XIV; Holdsworth, *History of English Law*, vols. III, 450; VII, 88-98, XII, 544, 545.

See also Winfield, *Quasi-Contract Arising from Compulsion* (1944), 60 L.Q.R., 341-355, at 342.

<sup>9</sup> *Lectures in Legal History*, Lecture XIV, *Implied Assumpsit*, 160.

<sup>10</sup> Section 50.

<sup>11</sup> (1760), 2 Burr. 1005; *supra*, 642.

<sup>12</sup> *Op. cit.*, 127.

natural justice, to refund, the law implies a debt, and gives this action, founded in the equity of the plaintiff's case, as it were upon a contract ('*quasi ex contractu*,' as the Roman law expresses it).<sup>1</sup>

It lies only for money which, *ex aequo et bono*, the defendant ought to refund."<sup>2</sup>

After pointing out the cases in which the action does not lie, Lord Mansfield continues:—

"But it lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition (express or implied); or extortion; or oppression; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances."<sup>3</sup>

The word "equity," in this passage, must now be construed in a non-technical sense<sup>4</sup>: The action is a "perfectly legal," not an equitable, action.<sup>5</sup> It had great procedural advantages.<sup>6</sup> Since Lord Mansfield's day the main headings of quasi-contractual recovery have been fixed and the scope of *aequum et bonum* has been confined to an interpretation of the facts so as to bring them within or without one of the recognised headings.<sup>7</sup> For this reason quasi-contractual recovery has not been permitted where failure of consideration is *partial* only; in logic there is no reason why such a claim should not have been allowed.

"I still believe," said McCardie, J., "that that action for money had and received is one which, as Lord Mansfield foresaw, must be applied to many new and unanticipated sets of facts. It is a useful, just and flexible form of claim. I believe that it lay at the root of the observations of Lord Loreburn and Lord Parker in the *Tamplin Case*."<sup>8</sup>

### 3. Modern Judicial Criticism

Certain great judges and some eminent jurists have thought that Lord Mansfield's basis of quasi-contract in "natural

<sup>1</sup> (1760), 2 Burr. 1008.

<sup>2</sup> *Ib.*, 1012

<sup>3</sup> *Ib.*, 1012. See also Fifoot, *Lord Mansfield*, 141, 146, 245-249

<sup>4</sup> See authorities cited by Winfield, *op. cit.*, 130.

<sup>5</sup> "Natural reason and the just construction of the law," as Blackstone said, have given us the various applications of the common counts, extending to the whole field of what we now call quasi-contract. In Lord Mansfield's hands the principles of natural equity were an enchanter's wand to call a whole new world of justice into being": Pollock, *The Expansion of the Common Law* (1904), 108. See also Shientag *op. cit.* 133-141.

<sup>6</sup> *Per* Pollock, C.B., in *Miller v. Allee* (1849), 13 Jur. 431, Parke, B., concurring.

<sup>7</sup> Winfield, 142-145, Fifoot, 149-151. and see *per* Hamilton, L.J., in *Baylis v. Bishop of London* [1913] 1 Ch. 127, 139, and *per* Lord Sumner in *Sinclair v. Brougham* [1914] A.C. 398, 454-456.

<sup>8</sup> Winfield, 133, 134.

<sup>9</sup> *Dominion Coal Co. v. Maskinonge Steamship Co.* [1922] 2 K.B. 132, 139, 140.

justice," i.e., the obligation to refund an unjust benefit—styled "the Mansfield fallacy"<sup>1</sup>—"has long since been buried."<sup>2</sup>

(a) Lord Sumner (while Hamilton, L.J.) observed, concerning the recovery of money paid under a mistake of fact, that "both the equitable and the legal considerations . . . have been crystallised in the reported common law cases."<sup>3</sup>

"The question is whether it is conscientious for the defendant to keep the money, not whether it is fair for the plaintiff to have it back."

That, indeed, was the question Lord Mansfield had put.

"To ask what course would be *ex aequo et bono* to both sides was never a very precise guide, and as a working rule it has long since been buried . . . Whatever may have been the case 146 years ago, we are not now free in the twentieth century to administer that vague jurisprudence which is sometimes attractively styled "justice as between man and man."<sup>4</sup>

Even in 1760, however, Lord Mansfield particularised and put into categories what he meant by *aequum et bonum*.

In *Sinclair v. Brougham*<sup>4</sup> it was sought to give the *coup de grace*. A building society had carried on the business of banking which was outside its objects. The depositors who had lent moneys under contracts of loan which, accordingly, were *ultra vires*, were not entitled, in the winding-up, to recover those moneys as money had and received by the society to their use. Lord Sumner declared—

"To hold otherwise would be indirectly to sanction an *ultra vires* borrowing. All these causes of action are common species of the *genus assumpsit*. All now rest, and long have rested, upon a notional or imputed promise to repay. The law cannot *de jure* impute promises to repay, whether for money had and received or otherwise, which, if made *de facto*, it would inexorably avoid."<sup>5</sup>

Since the depositors' moneys were inextricably mixed with the moneys of the shareholders, and since the society had used them, justice in that case was done by means of an equitable remedy—the "tracing order." The assets that remained after payment of the outside creditors were distributed *pari passu* between depositors and unadvanced shareholders.<sup>6</sup>

<sup>1</sup> Hanbury, *The Recovery of Money* (1924), 40 L.Q.R. 31, 36; reprinted in *Essays in Equity*, 1, 7.

<sup>2</sup> Per Hamilton, L.J., in *Baylis v. Bishop of London* [1913] 1 Ch. 127, 140.

<sup>3</sup> *Ib.*, at 140.

<sup>4</sup> [1914] A.C. 398.

<sup>5</sup> *Ib.*, at 452.

<sup>6</sup> This decision has recently been followed by the New Zealand Court of Appeal, in *Tauranga Borough v. Tauranga Electric Power Board* [1944] N.Z.L.R. 155, cited and discussed by "A.G.D." in (1945), 60 L.Q.R. 314, 315. The council, having authority to generate and sell electricity to consumers *within* the borough



Lord Sumner proceeded to say that the action for money had and received could not now be extended "beyond the principles illustrated in the decided cases"<sup>1</sup>: there was "no recognisable 'equity' " to recover money *in personam* "merely because it would be the right and fair thing that it should be refunded to the payer."<sup>2</sup> That, however, is not quite how Lord Mansfield put his principle: the criterion *he* proposed was whether the defendant is *under an obligation* to refund.

(b) *Viscount Haldane*, L.C., in his speech in the same case, after surveying "the wide scope" of the common *indebitatus* count of *assumpsit*, states that the remedy was "given only where the law could consistently impute to the defendant at least the fiction of a promise."<sup>3</sup> "The fiction of such a promise" could not be imputed where "it would have been *ultra vires* to give it . . . the presumption can give rise to no higher right than would result if the facts were actual."<sup>3</sup>

" . . . broadly speaking, so far as proceedings *in personam* are concerned, the common law of England really recognises (unlike the Roman Law) only actions of two classes: those founded on contract and those founded on tort. When it speaks of actions arising *quasi ex contractu* it refers merely to a class of action in theory based on a contract which is imputed to the defendant by a fiction of law. The fiction can only be set up with effect if such a contract would be valid if it really existed."<sup>4</sup>

These pronouncements of Lord Sumner and of Viscount Haldane, Lord Wright regards as disquisitions on legal history which, not being part of the decision, are *obiter dicta*.<sup>5</sup> The decision was that, by means of the equitable remedy of a tracing order, the assets, after paying outside creditors, should be divided *pari passu* among shareholders and depositors. A loss had occurred—and this should be borne equally. "The trouble has arisen because the Lords, as I think unnecessarily, reverted to legal antiquarianism in order to explain why an *ultra vires* borrowing did not give rise to any indebtedness in law or equity"<sup>6</sup>: that had been settled by authority. If the money

contracted to supply, and did supply, electrical energy to the board, which proposed to distribute, and did distribute, the energy to customers *outside* the borough. The Court of Appeal held that the contract was *ultra vires* and refused a personal action against the board. The court granted a proprietary remedy in the form of a tracing order: the board had received electrical energy to which it was not entitled, the property of the borough, the surplus of the proceeds of sale of which the board had in its possession. "A.G.D." regrets that the court, perpetuating the *obiter dicta* in *Sinclair v. Brougham*, refused a remedy *in personam*.

<sup>1</sup> [1914] A.C., at 453.

<sup>2</sup> *Ib.*, at 456.

<sup>3</sup> *Ib.*, at 417.

<sup>4</sup> *Ib.*, at 415.

<sup>5</sup> *Legal Essays and Addresses*, 18, 32.

<sup>6</sup> *Ib.*, at 16.

borrowed had been identifiable, a claim at law would have lain; identification impossible, an equitable remedy was invoked.<sup>1</sup>

(c) *Scrutton, L.J.*, agreed with the "very pungent criticisms" of Lord Sumner, saying of Lord Mansfield that he had—

"obscured . . . the nature of the action for money had and received . . . the whole history of this particular form of action has been . . . a history of well-meaning sloppiness of thought."<sup>2</sup>

Upon which Lord Wright justly observes:—

"I do not know why such things are said. I hope the office of the law is to seek and ensure justice. Lord Sumner puts the matter in a nutshell in *Sinclair v. Brougham* (at p. 458) when he is describing his final conclusion: 'In my opinion, if precedent fails, the most just distribution of the whole must be directed, so only that no recognised rule of law or equity be disregarded.' Precedent must come first, recognised rules of law and equity must be regarded, otherwise all certainty of law would disappear. But the underlying purpose is 'justice.'"<sup>3</sup>

(d) *Sir Wilfrid Greene, M.R.* (as he then was), in a claim for money had and received upon a mistake of fact, said:—

"Two propositions can, I think, be put forward with certainty. The first is that the claim cannot now be said to be based on some rule of *aequum et bonum* by virtue of which a man must not be allowed to enrich himself unjustly at the expense of another. Lord Mansfield's views upon those matters, attractive though they be, cannot now be accepted as laying the true foundation of the claim. The second proposition is that the claim is based upon an imputed promise to pay."<sup>4</sup>

(e) *Scott, L.J.*, makes a most interesting excursus into the juristic basis of "implied contracts."<sup>5</sup>

"The implied contract for money had and received," he observes, "has no element of agreement about it; it is implied in law, the name being a misnomer."<sup>6</sup>

In the seventeenth and eighteenth centuries, the range of implied contract "in the non-consensual sense" was "ever

<sup>1</sup> *Legal Essays and Addresses*, at 19.

<sup>2</sup> *Holt v. Markham* [1923] 1 K.B. 504, 573. See Dr. Allen's criticisms of this phrase, at 54 L.Q.R. 205, and his citation (at note 11) (upon the development of assumpsit to quasi-contract), from Ames, *Select Essays in Anglo-American Legal History*, III, 298: "Surely it would be hard to find a better illustration of the flexibility and power of self-development of the common law."

<sup>3</sup> *Legal Essays and Addresses*, 25.

<sup>4</sup> In *Morgan v. Ashcroft* [1938] 1 K.B. 49, 62. Lord Greene quotes in support, Lord Sumner's dictum in *Sinclair v. Brougham* [1914] A.C. 398, 452.

<sup>5</sup> [1928] 1 K.B. 74-77.

<sup>6</sup> *Ib.*, at 75.

expanding"; from the middle of the nineteenth century, "the pendulum has swung the other way."<sup>1</sup>

"There is no doubt that the moral principle of 'unjust enrichment' . . . has now been rejected by English courts as a universal or complete legal touchstone whereby to test this cause of action."<sup>2</sup>

After quoting a passage from the first edition of Leake on Contracts and the third edition of Bullen and Leake, he says:

"So wide a statement of the principle upon which the action for money had and received is founded . . . does not at the present time afford an authoritative criterion by which the court can decide whether a given claim discloses a cause of action for money had and received. The test is too vague; and even if it was ever a test, it has certainly been modified by recent decisions which have restricted the field of this action."<sup>2</sup>

On the other hand, Scott, L.J., emphasises "the importance of trying to find some positive common principles" as the basis of "implied contracts," which "will not altogether exclude that of unjust enrichment."<sup>2</sup> The "very heterogeneous list of causes of action" within the category of the action for money had and received induced a doubt whether Viscount Haldane's criterion was consistent with history—the criterion that "the fiction can only be set up with effect if such a contract would be valid if it really existed."<sup>3</sup> Some of these "implied contracts" are incapable of formulation as real contracts.<sup>4</sup>

### C. JURISTIC ANALYSIS

#### 1. *Holdsworth: Contract Implied by Law*

Holdsworth, evaluating Lord Mansfield, maintains that the principles laid down in 1760, though recognised and enforced in modern law, have taken "a shape different from that which he envisaged."<sup>5</sup> His successors rejected the notion that the action of *indebitatus assumpsit* was an equitable action, and when considering whether the action would lie, asked whether, "in

<sup>1</sup> [1938] 1 K.B., at 75.

<sup>2</sup> *Id.*, at 76; see Allen, 54 L.Q.R. 205, 206.

<sup>3</sup> *Sinclair v Brougham* [1914] A.C. 308, 415

<sup>4</sup> *Morgan v Ashcroft* [1938] 1 K.B., at 77. See also Scott, L.J.'s judgment in *Re Cleadon Trust, Ltd.* [1939] Ch. 286, 312-314; Holdsworth, *History of English Law*, VIII, 88-98; and Atkinson, J.'s consideration of the basis of quasi-contract, in *Transvaal & Delagoa Bay Investment Co., Ltd. v. Atkinson* (1944), 1 All E.R. 579, 583-585, following the law laid down in *Sinclair v. Brougham*, *supra*, and Note, "P. H. W." (1944), 60 L.Q.R. 205, 206.

Upon *Re Cleadon Trust, Ltd.*, *supra*, see Winfield, *Quasi-Contract arising from compulsion* (1944), 60 L.Q.R. 341-355, at 354, 355. He prefers the dissenting judgment of Sir Wilfrid Greene, M.R. (as he then was).

<sup>5</sup> *History of English Law*, vol. XII (1938), 542-547, at 542. See also Holdsworth, *Blackstone's Treatment of Equity* (1929-1930), 43 Harv. L. Rev., at 21-24.

the circumstances of the case, the law could imply a promise."<sup>1</sup> The gist of the action to recover money paid under a mistake of fact, Holdsworth maintains, is not that it is unconscientious to retain the money, but "the implication of a promise to repay because the payment has been made under such a mistake."<sup>2</sup>

The essence, therefore, of this kind of quasi-contract is not, in his view, "unjust benefit," but "relationship from which the law will imply a promise."<sup>3</sup> For three reasons, he holds, the idea of a contract implied by law should be retained: *First*, the "historical connection" with *assumpsit* is preserved and thus a "continuous and logical development of legal doctrine" is ensured. *Secondly*, "that element of a relationship between the parties analogous to a contract is introduced, absent from the test of "natural justice" or "unjust benefit." *Thirdly*, "this idea helps to define the sphere of quasi-contractual obligation"<sup>3</sup>: equity, not being bound to imply a promise, could give a remedy—as by "tracing order"—which common law could not give.<sup>4</sup>

In a later essay upon "*Unjustifiable Enrichment*," Holdsworth elaborated this outlook and sought to answer the new school.<sup>5</sup> The judges laid it down that the action for money had and received lay

"not to recover any unjustifiable enrichment which a defendant ought *ex aequo et bono* to refund, but only in cases where they could say that it was fair that the law should imply a promise by the defendant to repay. In other words, the remedy given by this action depends not on the fact that it was the right and fair thing that a repayment should be made, but on a true quasi-contract, i.e., upon the question whether the circumstances of the case were such that it was right that the law should imply an obligation analogous to a contract to repay."<sup>6</sup>

Although the "contract" is fictitious, some rules of contract must be applied to see if it is possible to impose this fictitious contract:

"... the question whether the enrichment is unjustifiable depends partly upon whether it is fair and right that the defendant should repay, and partly upon whether the relations of the parties are such that it is legally possible to imply a

<sup>1</sup> *History of English Law*, vol. XII, 543, 544.

<sup>2</sup> *Ib.*, 544, referring to *Kelly v. Solari* (1841), 9 M. & W. 54, 58, *per Parke, B.*

<sup>3</sup> *Ib.*, at 545.

<sup>4</sup> *Ib.*, at 547, citing Atkin, L.J., in *Banque Belge v. Hambrouck* [1921] 1 K.B., at 333, 335.

<sup>5</sup> (1939), 55 L.Q.R. 37-53.

<sup>6</sup> *Ib.*, at 41.

contract. The analogy to a contract, which is indicated by the word 'quasi-contract,' is thus logically made part of the test which determines in what circumstances it is possible to give a remedy for unjustifiable enrichment."<sup>1</sup>

The principle that the common law remedy is based upon a contract implied by law has been severely attacked.<sup>2</sup> The most weighty criticism has come from Lord Wright<sup>3</sup>: *First*, that since the law imposes on infants a liability to pay a reasonable price for necessities sold and delivered, the law *can* impute a promise to pay which it would not recognise if a promise were made in fact. *Secondly*, that since the old forms of action are abolished, the fiction of a contract implied in law is "otiose." *Thirdly*, that other legal systems, without the need of a fictitious contract, give a remedy for unjustifiable enrichment as such.<sup>4</sup>

Holdsworth's reply is as follows: *First*, an infant's contract for necessities is a valid contract.<sup>5</sup> *Secondly*, the fiction that the remedy for unjustifiable enrichment was based on a contract has given rise to the "rule of substantive law" that the court must ask:—

" 'Is it fair that the court should imply a contract between the plaintiff and defendant?' and not

" 'Is it fair that the defendant should make a repayment?' "<sup>6</sup>

*Thirdly*, in other legal systems, too, the character of the form of action determines the conditions of the remedy.<sup>7</sup>

The principle, supplemented by the rules of equity and of maritime law, does not produce injustice. He was sceptical of legislation where a fictitious contract cannot be implied.

Yet legislation is "the saner way"; the only way, if reform is needed, "which will preserve the continuity of the principles of English law."<sup>8</sup>

## 2. Professor Gutteridge: No Rule of Unjust Enrichment

Professor Gutteridge also takes the view that English law "has steadily refused to recognise any general obligation to

<sup>1</sup> *Ib.*, at 42, citing from Romer, L.J., in *Re Simms* [1934] Ch. 1, 31, 32.

<sup>2</sup> *Ib.*, at 45-53, citing Winfield, 141, and in 53 L.Q.R. 448; Jackson, 123; Friedmann, *Unjust Enrichment in English Law* (1938), 16 Can. Bar Rev., 343, 365; Lord Wright, 6 Camb. L.J. 305-326, *Legal Essays and Addresses*, 1-33.

<sup>3</sup> 55 L.Q.R. 46, 47; *Legal Essays and Addresses*, 23, 30-33.

<sup>4</sup> 55 L.Q.R. 47.

<sup>5</sup> *Sed quaere*. See Winfield, *Necessaries under the Sale of Goods Act, 1893* (1942), 58 L.Q.R. 82-95, at 93, who thinks that liability is quasi-contractual.

<sup>6</sup> 55 L.Q.R., at 48.

<sup>7</sup> *Ib.*, Holdsworth refers to the use in Scots law, of the *conductio* . . . "is it equitable that the courts should imply a contract, is it equitable that in the circumstances a *conductio* of one sort or another should lie?" (*ib.*, at 49, 50).

<sup>8</sup> *Ib.*, at 52.

restore a profit which is in the nature of an unjustified enrichment."<sup>1</sup>

The theory of unjustified enrichment "received its death blow in *Sinclair v. Brougham*."<sup>2</sup>

"An English court can only deal with cases in which *indebitatus assumpsit* would lie, and there are consequently many instances of an unjustified enrichment in which the impoverished party is left without a remedy because no contract can be implied in the circumstances of the case."<sup>3</sup>

The blame cannot be imputed entirely to the influence of the old forms of action.<sup>4</sup> The real reason lies

"in the absence of any general rule that a man ought not to be allowed to retain money or money's worth which he has obtained in circumstances which render it unreasonable and unfair that he should be allowed to keep it."<sup>5</sup>

English law has taken the view that "a man ought not to be made to accept a benefit or to incur a liability against his will."

"... in our English system it is dangerous to talk about 'natural justice' or '*aequum et bonum*' unless we are quite clear what we mean by those terms."

"Perhaps it may be possible to legislate and to extend the scope of the old *indebitatus* counts so as to remove the hardships which now exist if the circumstances are such as to negative the implication of a fictitious contract."<sup>6</sup>

### 3. Lord Wright: Obligation imposed on Facts of Case

Lord Wright, in an appreciation of Holdsworth, writes:—

"Holdsworth would, I think, to-day admit that, particularly since a recent Act and some recent judgments in the House of Lords, quasi-contract has shed the embarrassments of the implied contract and can be stated as a logical and simple theory for doing justice in cases of unjust enrichment."<sup>7</sup>

Quasi-contract—or "restitution," as it is called in *The Restatement*—is "a separate main category of the common law."<sup>8</sup> Analysing the speeches in *Sinclair v. Brougham*,<sup>9</sup>

"... unjust enrichment," he declares, "has no relation as a juristic conception with contract at all... 'contracts

<sup>1</sup> H. C. Gutteridge and R. J. A. David, *The Doctrine of Unjustified Enrichment*, (1934), 5 Camb. L.J. 204-229. At 223-229, Professor Gutteridge examines the problem. Does English Law Recognise a Doctrine of Unjustified Enrichment?

<sup>2</sup> [1914] A.C. 298, 456, per Lord Sumner

<sup>3</sup> *Ib.*, at 225, citing *Cowern v. Nield* [1912] 2 K.B. 419. *Leslie v. Shell* [1914] 3 K.B. 607; *Paquin v. Beauclerk* [1906] A.C. 148; *Bilbie v. Lumley* (1802), 2 East 469.

<sup>4</sup> 5 Camb. L.J., 226, 227.

<sup>5</sup> *Ib.*, at 227.

<sup>6</sup> *Ib.*, at 229.

<sup>7</sup> (1944), 60 L.Q.R. 141.

<sup>8</sup> *Legal Essays and Addresses*, 24. See also 34-65, at 36.

<sup>9</sup> [1914] A.C. 398; *Legal Essays and Addresses*, 1-33, at 15, 16.

implied by law ' signify a third head apart from contract and tort."

An infant and a lunatic were, at common law, and are, by statute, bound to pay a reasonable price for necessities.<sup>1</sup> This liability is not in contract, but in quasi-contract: the law did impute a promise to pay where an actual promise could not be enforced:

"I think it is safer," says Lord Wright, "to state the claim for unjust enrichment in such cases as depending on an obligation imposed by law in all the circumstances of the case in order to satisfy the requirements of justice . . ."<sup>2</sup>

In quasi-contract there is no intention to create a relationship between the parties:

"The obligation really arises from the fact of unjust retention of what should be restored to the plaintiff."<sup>3</sup>

It does not arise because or only where the law implies a contract:

"It arises by the operation of law on the facts of the case."<sup>4</sup>

Lord Wright follows Lord Dunedin's dictum in *Sinclair v. Brougham*<sup>5</sup> that the recipient is not ordered to pay as a debt what he has originally got, "but ordered merely to surrender what he still has as a superfluity, an enrichment which, but for the original reception of the money, he would have been without." The basis of the claim is "superfluity"—"in other words, simply unjust enrichment":

"the traceable possession in the defendant of the plaintiff's property or its products."<sup>6</sup>

Thus "the concept of debt . . . becomes logically otiose."

Lord Wright's answer to Lord Sumner is as follows: Since the House of Lords had long since decided that *ultra vires* borrowing did not give rise to a debt in law or equity, the statement that the action for money had and received was based upon an imputed promise to pay was "legal antiquarianism" and merely matter of *obiter dictum*.<sup>7</sup> "Views on legal history are not decisions." The liability of an infant for necessities sold and delivered is not based upon an imputed promise to pay,<sup>1</sup> but upon the actual supply of the necessities.<sup>8</sup> The Common Law Procedure Act, 1852, which made the *indebitatus assumpsit* count obsolete "cannot be dismissed as a mere

<sup>1</sup> *Re Rhodes* (1890), 44 Ch. D. 94, 107, *per* Lindley, L.J.; *Nash v. Inman* [1908] 2 K.B. 1, 8, *per* Fletcher Moulton, L.J.

<sup>2</sup> *Legal Essays and Addresses*, 24. See also 34-65, at 36.

<sup>3</sup> *Ib.*, at 404.

<sup>4</sup> *Ib.*, at 403.

<sup>5</sup> [1914] A.C. 398, 437.

<sup>6</sup> *Legal Essays and Addresses*, 12.

<sup>7</sup> *Ib.*, at 16, 32. And see Lord Wright, in (1939), 57 L.Q.R. 199, 200: "Had Lord Sumner . . . for the moment by accident omitted to notice the Acts of 1852 and 1873?"

<sup>8</sup> *Ib.*, at 22, 24.

pleading change."<sup>1</sup> The Judicature Act, 1873, abolishing forms of action had rendered the fiction unnecessary.<sup>2</sup>

Lord Wright cites two decisions of the Court of Appeal which, he maintains, prove that the theory of a contract implied by law is inapplicable to quasi-contract. In *Craven-Ellis v. Canons, Ltd.*<sup>3</sup> the managing director of a company who had done work for the company under an agreement providing for his remuneration, which, the directors not being qualified, was void, recovered for his services on a *quantum meruit*.

" . . . the obligation to pay reasonable remuneration for the work done," said Greer, L.J., " when there is no binding contract between the parties is imposed by a rule of law, and not by an inference of fact arising from the acceptance of services or goods."<sup>4</sup>

In the law of quasi-contract, the importance of this decision has been well pointed out. The court imposed an obligation to pay which did not exist in contract.<sup>5</sup>

The other case is *Brook's Wharf & Bull Wharf, Ltd. v. Goodman Brothers*.<sup>6</sup> Lord Wright, M.R. (as he then was), delivered the considered judgment of the court. The short effect of the case is best conveyed in Lord Wright's own extra-judicial words:—

" . . . the plaintiffs had discharged a liability for customs dues under compulsion of law for which the defendants were primarily liable, because it attached to the defendants' goods. There was a contract of bailment of the goods which contained no term applicable to these circumstances. The court held that they could not imply a term because they could not say what the parties would have agreed. But they proceeded

<sup>1</sup> *Ib.*, at 31, referring to Bullen and Leake, *Pleadings* (1868), 3rd. ed., 36.

<sup>2</sup> *Ib.*, at 33.

<sup>3</sup> [1936] 2 K B. 403

<sup>4</sup> *Ib.*, at 412. But see A. T. Denning, *Quantum Meruit The Case of Craven-Ellis v. Canons, Ltd.* (1939), 35 L.R.Q. 54-65, maintaining that the plaintiff succeeded because there were facts from which a contract could be inferred, and contrasting *Re Clendon Trust, Ltd.* [1938] Ch. 600, [1939] Ch. 286. There, the plaintiff director who, at the secretary's request, had advanced money for the company's benefit to two subsidiary companies upon a resolution that had not been validly confirmed, failed to recover the company had no knowledge or acquiescence rendering it liable at common law under an implied contract and further, there was no liability in equity (Scott and Clauson, L.J.J., Sir Wilfrid Greene, M.R., dissenting on the latter point).

See *per* Scott, L.J., on unjust enrichment, citing the juristic discussion (*ib.*, at 314). Friedmann well criticises the decision and the reasoning (1939), 2 Mod. L. Rev. 315-318.

<sup>5</sup> Friedmann (1937), 1 Mod. L. Rev. 76, 77: " The language of the learned Lord Justices hardly suggests that they were aware of giving a decision of such importance." (See also 53 L.Q.R. 450.) Denning, J., however, criticised the tendency to treat this case " as deciding more than it actually did decide and to use it to support views which are not orthodox " (55 L.Q.R. 54).

<sup>6</sup> [1937] 1 K.B. 534.



to give judgment for the plaintiffs on the basis that the defendants would be unjustly benefited at the cost of the plaintiffs if the latter, who had received no extra consideration and made no express bargain, should be left out of pocket by having to discharge what was the defendants' debt. The test was the unjust enrichment of the defendants at the expense of the plaintiffs."<sup>1</sup>

Lord Wright, after referring in his judgment to certain authorities, declares:—

"These statements of the principle do not put the obligation on any ground of implied contract or of constructive or notional contract. The obligation is imposed by the court simply under the circumstances of the case and on what the court decides is just and reasonable, having regard to the relationship of the parties. It is a debt or obligation constituted by the act of the law, apart from any consent or intention of the parties or any privity of contract."<sup>2</sup>

True, there was a contract of bailment, but this obligation had never been contemplated by the parties.

"The court cannot say what they would have agreed if they had considered the matter when the goods were warehoused. All the court can say is what they ought as just and reasonable men to have decided as between themselves. The defendants would be unjustly benefited at the cost of the plaintiffs if the latter, who had received no extra consideration and made no express bargain, should be left out of pocket by having to discharge what was the defendants' debt."<sup>3</sup>

<sup>1</sup> *Legal Essays and Addresses*, 29, 30.      <sup>2</sup> [1937] 1 K.B., at 545.

<sup>3</sup> *Ib.*, at 545. *Mr. J. A. Landon* criticises Lord Wright's exegesis as inconsistent with the authorities (53 L.Q.R. 302-304). The House of Lords, he says, laid down "once and for all" that the action for money had and received is based upon implied contract. It is too late to resuscitate the "Mansfield fallacy" (Hanbury's phrase, 40 L.Q.R. 36). *Holdsworth* did not think that this decision had overruled "the long line of cases in which liability is based on the implication of a contract" (55 L.Q.R. 43, 44). *Denning, J.*, points out that historically the obligation is founded on "an imputed promise to repay" (55 L.Q.R. 64). He cites 1 *Wms. Saunders* (1845 ed.), p. 264b: "If the payment made by the plaintiff be compulsory, the law raises an implied promise on the part of the defendant to repay him; and the compulsion is evidence of the request."

*Professor Winfield*, on the other hand, with Lord Wright, thinks that in the modern law of quasi-contract the fiction of implied contract is unnecessary (53 L.Q.R. 447-449). If, however, the House of Lords did regard liability as dependent on a fictitious contract, the modern test is: "If it is reasonable in all the circumstances of the case that a contract should be implied, the courts will imply one." The "just and reasonable" is merely "natural justice" in another guise." If an action for money had and received is covered by authority that, on those facts, there was or was not an "implied contract," the judge can

"take refuge in that blessed phrase without bothering further about what is 'just and reasonable'; but if the case before him is not exactly covered by any earlier decision, he will have to consider whether it is fair and reasonable that he should have to imply a contract. To put it in another way, 'implied

An extra-judicial essay written in 1941 upon *United Australia v. Barclays Bank*<sup>1</sup>, underlines these views.<sup>2</sup> In the speeches of the House of Lords, Lord Wright finds "three fundamental principles of the law." *First*: "that substance is predominant over form, that the forms of action are as dead as mutton that not even their ghosts survive"; *Secondly*: "that unjust enrichment, or quasi-contract or restitution, however it is called, is a distinct category in the common law separate from either contract or tort"<sup>3</sup>; *Thirdly*: the speeches contain "a strong undercurrent of what may be called the ethical element which pervades modern law . . ."<sup>4</sup>

Lord Atkin observes that to find in contract a basis for actions such as claims for money paid on a consideration that had wholly failed, was "quite obviously impossible." The cheat or blackmailer does not "promise" to repay; nor does the thief promise to repay the proceeds. But to enable the

contract' is not the foundation of liability of this kind: it is only the facade of it" (53 L.Q.R. 448).

Friedmann thinks that the courts "are beginning to take a different attitude towards the problem of quasi-contract and of unjust enrichment in general" (53 L.Q.R. 450). He refers to the remark of Zechariah Chafee (1935), 48 Harv. L. Rev., 527, that in *Sinclair v. Brougham* [1914] A.C. 398, the House of Lords merely abandoned one fiction (i.e., of an implied contract) and resorted to another, i.e., that the money in the hands of the society was the same as that originally deposited.

"G.R.Y.R." regards Prof. Winfield's attempt to whittle away the effect of the decision in *Sinclair v. Brougham* as "a dangerous instance of playing fast and loose with authority" (54 L.Q.R. 24, 25).

Dr. Carleton Kemp Allen is latest in the fray, in his discussion of *Berg v. Sadler and Moore* [1937] 2 K.B. 158, and *Morgan v. Ashcroft* [1938] 1 K.B. 49: *Fraud, Quasi-Contract and False Pretences*. (1938), 54 L.Q.R. 201-216. Both elements, he thinks—constructive contract, and *aequum et bonum*—are equally essential to quasi-contract: the issue between the disputants is one of emphasis (*ib.*, at 202). The element of *aequum et bonum*—in the decided cases on money had and received—is "not only present but essential": when the remedy has been refused the reason has usually been that "restitution was not incontestably in accordance with *aequum et bonum*" (*ib.*, at 206). Although, in every case of unjust enrichment, an action does not lie in quasi-contract, "yet in all the recognised forms or 'heads' where quasi-contract does lie, a principle which may fairly be described as unjust enrichment is clearly discernible" (*ib.*, at 207). Thus, there is "no great variance" between Prof. Winfield and Mr. Friedmann of the one part, and Dr. Radcliffe and Mr. Landon of the other part (*ib.*).

<sup>1</sup> [1941] A.C. 1: upon "waiver of tort" which is really a choice of remedies.

<sup>2</sup> (1941), 57 L.Q.R. 184-202.

<sup>3</sup> 57 L.Q.R. 184, referring to the speech of Viscount Simon, L.C. [1941] A.C. 19.

<sup>4</sup> 57 L.Q.R. 185, citing from Viscount Simon, L.C.'s speech [1941] A.C. 21, 22.

"The appellants have lost their money, and they have lost it owing to the tort of the respondent bank. Why should they not recover it in this action? . . . The general 'principles of right' would surely indicate that the respondent bank should not escape because the appellants have wasted time and money in pursuing another remedy which turned out to be illusory . . . But, while admiring the subtlety of the old special pleaders, our courts are primarily concerned to see that rules of law and procedure should serve to secure justice between the parties."

man so wronged to recover, "it was necessary to create a fictitious contract, for there was no action possible other than debt or *assumpsit* on the one side and action for damages for tort on the other."<sup>1</sup> The action of *indebitatus assumpsit* was therefore supported by the court's imputing a promise to repay. Sometimes the judge "created a fanciful relation between the plaintiff and the defendant."

"But the fiction is too transparent. The alleged contract by the blackmailer and the robber never was made and never could be made. The law, in order to do justice, imputed to the wrongdoer a promise which alone as forms of action then existed could give the injured person a reasonable remedy."<sup>2</sup>

Finally, in the same essay, Lord Wright with emphasis restates the theme: the abolition of forms of action has made it clear that besides contract and tort

"there is a further distinct category, which has been variously named, quasi-contract, restitution, unjust enrichment."<sup>3</sup>

Each term had something to recommend it :—

"quasi-contract indicates that the cause of action is more akin to contract than to tort. Restitution has the distinction of being the name chosen by the American Law Institution for their restatement of that branch of the law. It indicates one leading feature, which is that, in the main and generally, the claim is for the benefits wrongly acquired by the defendant, and not for damages for a tort. The term 'unjust enrichment' indicates that the cause of action is that the defendant has been enriched (or has received benefits) to which he is not legally entitled at the expense of the plaintiff."<sup>4</sup>

#### D. PARTIAL FAILURE OF CONSIDERATION

##### 1. *No recovery of Money Paid*

Why, then, despite Lord Wright's conviction that the law imposes upon a man an obligation to return a benefit to which he is not legally entitled—why should not the law impose this obligation when the consideration has only *partially* failed? Why, if the manufacturers, having received their £1,000, had actually delivered *part* of the machinery—why, at common law, would they have been entitled, whatever the machinery was worth, to keep the whole £1,000? If that machinery were worth £500 only, can it be argued that the retention of the remaining £500 would not constitute "unjust enrichment"? If it be said that the manufacturers must have incurred the expense of

<sup>1</sup> [1941] A.C., at 27.

<sup>2</sup> *Ib.*, at 28.

<sup>3</sup> 57 L.Q.R. 198.

<sup>4</sup> *Ib.* at 198, 199. For a criticism of the term "quasi-contract," see *Leavey and Scott*, at 54 L.Q.R. 38, 39, stating (*inter alia*) that "there is no fundamental difference between the restitutional rights enforced at law and those enforced in equity."

manufacturing, they may well have incurred considerable expense in laying down plant for the contract before a particle of machinery was delivered. The machinery may have been ready for delivery. If frustration occurred before any machinery were delivered, they would be entitled to nothing. What logical distinction exists between the buyer who, having received nothing, asks for his money back, and the buyer who has received something and asks for the balance of the money he has paid in advance to be returned? There is no logical distinction, it is submitted, and some have thought that the House of Lords, in *The Fibrosa Case*,<sup>1</sup> missed the unique opportunity of so declaring the law. It is true that there the failure of consideration was total. Yet every one of the seven noble and learned lords declared—to quote Lord Porter—that

“A partial failure of consideration gives rise to no claim for recovery of part of what has been paid.”<sup>2</sup>

These dicta are clearly *obiter*, but the weight of their unanimity is overwhelming. The real purpose—it may be—that moved the House to make these observations was—as the event proved—to exhibit to lawyers and to the Legislature the instant need for remedial legislation. At the close of his speech the Lord Chancellor declared that it must be for the Legislature to decide “whether provision should be made for an equitable apportionment of prepaid moneys . . .”<sup>3</sup> Lord Porter pointed out that “without an Act of Parliament it is difficult to determine what sum shall be recoverable and on what principles.”<sup>4</sup> If no money had been prepaid, it was clear that loss could not be made good.<sup>5</sup>

Twelve months later the Legislature was to intervene with a comprehensive system for adjusting rights and liabilities under frustrated contracts. Meanwhile, the House felt that the reversal of *Chandler v. Webster*<sup>6</sup> could be accomplished by “the application of an old-established principle of the common law,” which “does enable a man who has paid money and received nothing for it to recover the money so expended.”<sup>7</sup>

<sup>1</sup> [1943] A.C. 32. See Note (1942), 56 Harv. L. Rev. 307, 308: “The decision purports to be limited to instances where there has been a total failure of consideration, but it is difficult to see why the policy against unjust enrichment, upon which the decision rests, does not also dictate that one whose performance is partially prevented should restore that which he has received in so far as it is disproportionate to that which he has rendered.”

<sup>2</sup> *Ib.*, at 77. See also *per* Viscount Simon, L.C. (at 49), *per* Lord Atkin (at 54, 55); *per* Lord Russell of Killowen (at 56); *per* Lord Macmillan (at 60); *per* Lord Wright (at 72); *per* Lord Roche (at 75).

<sup>3</sup> *Ib.*, at 49.

<sup>4</sup> *Ib.*, at 78.

<sup>5</sup> *Ib.*, at 55, *per* Lord Atkin. See also at 56, *per* Lord Russell of Killowen, and at 78, *per* Lord Porter, on the supplier who, having received no payment in advance, has done the work but has not delivered the goods.

<sup>6</sup> [1904] 1 K.B. 493; *supra*, 596.

<sup>7</sup> [1943] A.C., at 55, *per* Lord Atkin.

## 2. *Explanation Historical*

In history rather than in logic the answer should be sought.

It is not clear why the plaintiff should not recover to the extent that the money paid to the defendant exceeds in value the benefits received from the defendant.<sup>1</sup> To say that it is impossible to apportion the consideration is not satisfactory; juries, normally, do that every day.<sup>2</sup>

"The true explanation"—Keener ventures to suggest—

"would seem to be that the creation of a right in quasi-contract in the cases considered in this section, where an adequate remedy exists for a breach of contract is to be regarded as anomalous, and the courts have refused to extend the anomaly so as to allow a recovery in cases of partial failure of consideration."<sup>3</sup>

Of this rule, that where there has been part payment of an unapportionable consideration the plaintiff can recover nothing, Woodward observes: "Upon principle, this limitation or rule is difficult to support."<sup>4</sup>

The rule, however, had been too long settled to be altered otherwise than by legislation.

In the *Notes* (1795), on *Dutch v. Warren* (1720),<sup>5</sup> it is observed that the contract must be "totally rescinded, and appear unexecuted in every part at the time of bringing the action; since otherwise, the contract is affirmed by the plaintiff's having received part of that equivalent for which he paid his consideration, and it is then reduced to a mere question of damages proportionate to the extent to which it remains unperformed."

In *Towers v. Barrett*,<sup>6</sup> Buller, J., explaining that the action for money had and received lies where the contract is rescinded, observes:—

"... where the plaintiff is entitled to recover his whole money, he must show that the contract is at an end; but if it continue open, he can only recover damages, and then he must state the special contract and the breach of it."

In *Hunt v. Silk*,<sup>7</sup> where the plaintiff had occupied premises under an agreement, and paid £10 in respect of repairs, but the defendant had failed to perform his agreement and to execute a lease, the plaintiff was not entitled to recover his £10 in an action for money had and received, but could only declare for a breach of the special contract. Lord Ellenborough said:—

"Now where a contract is to be rescinded at all, it must be

<sup>1</sup> Keener, *op. cit.*, 305.

<sup>2</sup> *Op. cit.*, 306.

<sup>3</sup> *Op. cit.*, 306.

<sup>4</sup> Section 130, p. 205.

<sup>5</sup> 1 Stra. 406: author's italics. The case is explained by Lord Mansfield in *Moses v. Macferlan* (1760), 2 Burr 1005, 1011.

<sup>6</sup> (1786), 1 T.R. 133, 146. See *Giles v. Edwards* (1797), 1 T.R. 181.

<sup>7</sup> (1804), 5 East 449, 452.

rescinded *in toto*, and the parties put in *statu quo*. But here was an intermediate occupation, a part execution of the agreement, which was incapable of being rescinded."

In *Taylor v. Hare*,<sup>1</sup> T sued for the return of an annuity of £100 which he had paid for several years in order to use a patent of an invention of which he wrongly supposed himself to be the inventor. The invention, it appeared, was not new and the patent was void, and it was contended that the consideration was wholly void. The plaintiff, having had the benefit of user for some years, failed to recover what he had paid. He did not claim apportionment.

In *Beed v. Blandford*<sup>2</sup> the Court of Exchequer Chamber regarded it essential to an action for money had and received that the parties should be restored to their original situation. The master and part owner of a vessel agreed to buy the half of his partner, paid the price, received the deeds and obtained possession. His partner refused to execute a bill of sale or to return the money. The plaintiff failed to recover the price.

"In order to sustain an action in this form, it is necessary that the parties should, by the plaintiff's recovering the verdict, be placed in the same situation in which they originally were before the contract was entered into."

In 1860, in an action by the purchaser of bills, arising out of joint exchange operations, the Court of Queen's Bench observed:

"The count for money had and received is out of the question because the consideration did not wholly fail."<sup>3</sup>

In *Colton v. Dorell* (1869),<sup>4</sup> heard by the Court of Common Pleas, C sued D for £56 for the use and occupation of a house. He had agreed to let the house at a certain rent, a premium of £50 to be paid on the completion of the lease. D went into possession and paid £42 on account of the premium, but later refused to take up the lease. Against the claim, D unsuccessfully sought to set off £42; the consideration had not wholly failed and the parties could not be put in *statu quo*. If there had been a breach of contract, the defendant could sue on the agreement.<sup>5</sup>

In *Whincup v. Hughes*<sup>6</sup> (1871), a very strong court (consisting of Bovill, C.J., Willes, Montague Smith and Brett, JJ.) restated the rule that where the failure of consideration was partial, no action lay for money had and received.

<sup>1</sup> (1805), 1 Bos. & P. (N.B.) 260.

<sup>2</sup> (1828), 2 Y. & J. 278, 283, *per* Alexander, L.C.B.

<sup>3</sup> *Nicholson v. Ricketts* (1880), 6 Jur. (N.S.) 422, 428, *per* Crompton, J. See also at 427, *per* Cockburn, C.J.

<sup>4</sup> 17 W.R. 672.

<sup>5</sup> *Ib.*, *per* Keating and Smith, JJ., upholding the ruling of Byles, J.

<sup>6</sup> L.R. 6 C.P. 78. See *per* Lord Wright in [1943] A.C. 32, at 72.

W apprenticed his son to a watchmaker for six years and paid a premium of £25. After instructing the apprentice for a year, the master died. W sued the executrix for a return of the whole or part of the premium as money had and received. Bovill, C.J., said :—

“The general rule of law is, that where a contract has been in part performed no part of the money paid under such a contract can be recovered back. There may be some cases of partial performance which form exceptions to this rule, as, for instance, if there were a contract to deliver ten sacks of wheat and six only were delivered, the price of the remaining four might be recovered back. But there the consideration is clearly severable.”<sup>1</sup>

Here the contract was part performed and the general rule must apply unless the consideration “be in its nature apportionable.” On what principle could it be apportioned? The proportion of the period of instruction to the whole term? But in the early part, teaching would be onerous and the services of the apprentice of little value; later, his services would be worth more and he would require less teaching.<sup>2</sup> To estimate what the master might have lost by the loss of service would be “almost impossible.”<sup>3</sup>

“We have no jurisdiction to override the intention of the parties as expressed in this contract of apprenticeship”<sup>4</sup> said Willes, J. Later in his judgment he refers to

“the doctrine of the common law which . . . does not compel any return on the partial failure of consideration . . .”<sup>5</sup> Montague Smith, J., said that the intention was clear,

“Independently of the rule of law, that an action for money had and received can only be brought when there is a total failure of consideration, with the exception of a few cases which, . . . hardly prove to be exceptions . . .”<sup>6</sup>

If the parties had intended any return of premium they would have provided for it.

“Moreover . . . the action for money received cannot lie where the contract has been partly performed on both sides. To ascertain the amount, which equity in such a case requires to be returned, it would be necessary to go into a great variety of considerations, the relative weight of which it would be almost impossible correctly to estimate, e.g., the value of the services lost to the master, and the degree to which the apprentice had profited by the instruction.”<sup>7</sup>

Brett, J., enunciated the rule with clarity :—

“Now the case cannot be brought within the rule of law

<sup>1</sup> (1871), L.R. 6 C.P., at 81.

<sup>2</sup> *Ib.*, at 81.

<sup>3</sup> *Ib.*, at 82.

<sup>4</sup> *Ib.*, at 83.

<sup>5</sup> *Ib.*, at 84.

<sup>6</sup> *Ib.*, at 85.

<sup>7</sup> *Ib.*, at 85, 86.

relating to total failure of consideration, or mutual rescission of a contract. It comes within the rule that where a sum of money has been paid for an entire consideration, and there is only a partial failure of consideration, neither the whole nor any part of such sum can be recovered. No authority has been cited in favour of the plaintiff at common law."<sup>1</sup>

To overrule this cumulative weight of authority was manifestly impossible: only by legislation would a comprehensive scheme of adjustment be possible.

In Scotland the position was always different: the person benefited may have to account to the other party to the extent of the benefit that he has received:—

"No doubt, if he perform a part and then fail in completing the contract, I shall be bound in equity to allow him credit to the extent to which I am *lucratus* by his materials and labour, but no further; and if I am not *lucratus* at all, I shall be entitled to repetition of the whole advance, however great his expenditure and consequent loss may have been."<sup>2</sup>

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<sup>1</sup> *Ib.*, at 86. Certain decisions in equity had been cited, in particular *Hirst v. Tolson* (1850), 2 Mac & G 134, but they were doubted and held to be inapplicable. *Whincup v. Hughes* (*supra*) was followed in *Ferns v. Carr* (1885), 28 Ch. D. 409, where Pearson, J., held that the estate of a solicitor who had died during the term of the articles of an articled clerk was not liable for any part of the premium.

See *Mayor and Corporation of Bootle-cum-Linacre v. The County Council of Lancashire* (1890), 60 L.J.Q.B. 323, 327, *per* Lindley, L.J.: "Nor is there any authority for showing that money, which has been paid for a consideration which has not wholly failed, can be recovered unless you can apportion it."

<sup>2</sup> *Per* Lord President Inglis in *Watson & Co v. Shanlland* (1871), 10 M. 142, 152. See also *The Cantware Case* [1924] A.C. 226, 249-261; *supra*, 613.

But see Lord Atkin's observations in *The Fibrosa Case* [1943] A.C. 32, 54; *supra*, 639; and see the observations of Lord Macmillan and Lord Wright, in *The Denny Mott Case* [1944] A.C. 265, 273, 281; *supra*, 524.



## CHAPTER XXVI

### THE LEGISLATURE INTERVENES

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#### LAW REFORM (FRUSTRATED CONTRACTS) BILL, 1943

##### 1. *Two Main Objects*

ON 22nd June, 1943, the Law Reform (Frustrated Contracts) Bill, introduced into the House of Lords by the Lord Chancellor, was ordered to be printed. Viscount Simon, L.C., moving the Second Reading on 29th June, 1943,<sup>1</sup> pointed out that if, before the date of frustration, there had been a prepayment "there is no doubt now that the English law is that the man who has received that prepayment has got to hand it back." A "very simple" rule, but sometimes "very harsh": the recipient may have acquired materials or started manufacture. The *first object* of the Bill was to alter that. Although, in the event of frustration, the recipient must hand back the prepayment, he is entitled to *set off expenditure incurred* in and about the execution of the contract.<sup>2</sup>

The *second main provision* of the Bill concerned the other party who may, before frustration, have *received some benefit*. A portion of machinery ordered has been delivered; the recipient must pay for it. Apart from the Bill he would not be liable to pay until the contract is completed: "under frustration that time will never arrive." A decorator undertakes to paint a house. When he has done half the work, painting of houses is prohibited under Defence Regulation. The owner should pay "a fair amount for the benefit."<sup>3</sup>

Since the Bill was already well known in the commercial community, the statutory relief would apply to *existing contracts* which became frustrated on or after 1st July, 1943.<sup>4</sup>

##### 2. *Charterparties generally Excluded*

"Any charterparty, except a time charterparty or a charterparty by way of demise, or any contract (other than a charter-

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<sup>1</sup> *Official Report*, vol. 128, 29th June, 1943, cols. 135-151. The views expressed in the debate are not, of course, evidence upon the meaning of the statute. But they are significant and worthy of record.

<sup>2</sup> *Ib.*, col. 138.

<sup>3</sup> *Ib.*, col. 139.

<sup>4</sup> *Ib.*, col. 140.

party) for the carriage of goods by sea would be exempted from the Bill." The reason is that "there have been long established as part of the general maritime law the two principles that advance freight is not repayable, even though ship and cargo be lost before delivery can be effected, and secondly, that unless otherwise agreed, freight (other than advance freight) is only payable if the contract is completely performed."<sup>1</sup> Any alteration of these principles would involve "substantial modification of the present insurance practice."<sup>2</sup> Hire payable under a *time charterparty*, or a *charterparty by way of demise*, was not governed by any "similar generally accepted rule": these contracts come within the ambit of the Bill.<sup>2</sup>

### 3. When Insurance Relevant

Upon the *Third Reading*, the Lord Chancellor indicated *two small changes*—both concerned with insurance.<sup>3</sup>

*First*: a contract of insurance is not "ordinarily susceptible to the law of frustration": as soon as the premium is paid and the risk attaches, "it is well established in law and custom that the premium is not returnable."<sup>4</sup> The Bill would specifically exclude contracts of insurance.<sup>4</sup>

*Secondly*, to clause 1 (5), which provided that the court should not take into account any sums payable upon frustration under any contract of insurance, there would be added the words "*unless there was an obligation to insure imposed by an express term of the frustrated contract or by or under any enactment.*"<sup>5</sup>

<sup>1</sup> House of Lords, *Official Report*, vol 128, cols. 140, 141.

<sup>2</sup> *Ib.*, col 141. "*Charters by way of demise*"—"bare-boat charters"—had again come into common use by the British and by the American Governments where ships could not be manned by the owners' own crews. See also Viscount Hailsham's speech *ib.*, cols. 147-148. Lord Wright commended the Bill, referring to the "unqualified approval" given by The Association of British Chambers of Commerce *ib.*, col. 148. See *The Times*, 10th August, 1943, letter from Viscount Simon, L.C., to the President.

<sup>3</sup> *Official Report*, vol 128, 8th July, 1943, cols. 367-371.

<sup>4</sup> *Ib.*, col 367. See also *Official Report, Debate on the Second Reading in House of Commons*, vol. 391, 23rd July, 1943, cols. 1342-1347.

The point was again raised at the committee stage *Official Report*, vol. 391, 28th July, 1943, cols. 1741-1751. The Attorney-General observed that "If I insure against sickness on 1st January and die on 1st February, my executors cannot get back eleven-twelfths of the premium." The risk may go up; the insurance company cannot increase the premium. The risk may go down, none of the premium is repayable. The risk may disappear altogether.

"but it is well settled, and the whole insurance business of London, which is the insurance centre of the world, is conducted on the basis that once a premium has become due no part of it is repayable even if the subject-matter of the risk disappeared during the period covered" (*ib.*).

The sub-clause was merely inserted "out of caution, possibly excessive caution, but to make it clear that we do not propose and we do not desire to alter the general law governing insurance contracts where the subject matter ceases to be at risk" (col. 1748).

<sup>5</sup> *Ib.*, col. 368.

Ordinarily, said Viscount Simon, L.C., a contract of insurance—upon the issue of recovering or retaining a prepayment—was irrelevant, “purely collateral.” But one case required express provision: where *the frustrated contract itself called for a policy to be taken out by one of the parties, or when the law required it*. Thus, where A is under contract to do work on B’s premises, the contract may provide that a policy be taken out to protect the premises against fire while that work is going on.

“If it is part of the bargain between the parties that there should be a policy of insurance taken out, then it seems to me . . . right that if the contract becomes frustrated the effect of the policy of insurance should be taken into account.”<sup>1</sup>

Again, under the War Damage Act, 1913, a policy must by law be taken out in respect of business goods. If those goods are destroyed by enemy action, that would probably frustrate a contract dealing with them: “but it would be quite wrong . . . for the party who is now going to receive money instead of the goods not to be treated as being in much the same position as if he really had the goods.”<sup>2</sup>

<sup>1</sup> House of Lords, *Official Report*, vol. 128, cols. 368, 369.

<sup>2</sup> *Ib.*, col. 369.

## CHAPTER XXVII

### LAW REFORM (FRUSTRATED CONTRACTS) ACT, 1943

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#### SECTION 1.—ADJUSTMENT OF RIGHTS AND LIABILITIES OF PARTIES TO FRUSTRATED CONTRACTS

##### *Subsection (1).—Effect of Frustration : the New Law<sup>1</sup>*

"Where a contract governed by English law has become impossible of performance or been otherwise frustrated, and the parties thereto have for that reason been discharged from the further performance of the contract, the following provisions of this section shall, subject to the provisions of section two of this Act, have effect in relation thereto."

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<sup>1</sup> The preamble to the statute passed on 5th August, 1943, runs: "*An Act to amend the law relating to the frustration of contracts.*" See Commentaries upon the Act by Sir Arnold McNair, in (1944), 60 L.Q.R. 160-174, and by Glanville L. Williams, *The Law Reform (Frustrated Contracts) Act, 1943*. See also Prof. H. C. Gutteridge and Dr. Lipstein, *Conflicts of Law in Matters of Unjustifiable Enrichment* (1939), 7 Camb. L.J., 80.

## NOTES

(a) *The Statute should be given a liberal interpretation.*—“... this statute is not a mere epitome of principles already to be found in case law, but possesses an individuality of its own. Nor was it designed for the purpose of curing technical defects in our law: it represents a change which is taking place not merely in English law but also in other systems, namely, a new attitude towards the hardships which may be caused by rigid adherence to the principle of *pacta sunt servanda*. In these circumstances the Act should, it is submitted, be construed and applied as liberally as possible and not in the light of pre-existing case law, unless this is made imperative by the nature of the language employed by the draftsman.”<sup>1</sup>

(b) *Only contracts governed by English law* come within the ambit of the Act.—The Act does not apply to Scotland which has already accepted the principle of restitution.<sup>2</sup> The interpretation of a contract is governed by the law which the parties intended to apply: the “proper law of the contract.” An intention expressed in the contract is conclusive. In the absence of an express intention, the “proper law” will depend upon the “terms of the contract and the relevant surrounding circumstances.”<sup>3</sup>

The “proper law” is the right test, for although, juristically, the restitution of money and of the value of benefit is founded in quasi-contract, the remedy arises because there was a *contract* which became frustrated<sup>4</sup>: whether frustration has supervened

<sup>1</sup> Professor Gutteridge in his review of Glanville Williams' book, at (1945), 61 L.Q.R. 98.

<sup>2</sup> See Cmd 6009, at 6. see also *per* Lord Macmillan in *The Fibrosa Case* [1943] A.C. 32; and *per* Lord Shaw, in *The Cantuari Case* [1924] A.C. 226, 259.

<sup>3</sup> See *R. v. International Trustee for the Protection of Bondholders, Aktiengesellschaft* [1937] A.C. 500, 529, *per* Lord Atkin.

<sup>4</sup> *Contra*, G. L. Williams, *op cit*, 19, 20, citing Gutteridge and Lipstein (1939), 7 Camb. L.J., 80.

Professor Gutteridge points out (7 Camb. L.J., 82) that *The Restatement of the Conflict of Laws* makes the choice of law in quasi-contract depend on the law of the place where the benefit is conferred, or the law of the place of enrichment, as the case may be (ss. 452, 453). The learned authors think that in a dispute of a quasi-contractual nature which contains a foreign element, an English judge has a free hand in choice of law (*ib.*, 88). The law of the *domicil* they reject (*ib.*, 89). The *lex loci situs*—the place of the payment of the transfer of property—although open to criticism, is the law which has “the closest connection with the enrichment”; (*ib.*, 89, 90). The test based on “the proper law of the contract,” they regard as involving a “cumulation of fictions”—the assimilation of a contract with quasi-contract and the presumption of an intention of restitution (*ib.*, 90). They admit that “where the enrichment springs from a previous contract, the solution which would apply the law of the original contract is attractive, but might lead to an impasse” (*ib.*). The *lex fori*, i.e., English law—although the test possesses “certain merits”—has “few supporters” (*ib.*, 91). The learned authors think that quasi-contractual restitution is not a procedural matter, but in the nature of a debt to be ascertained by the law governing the obligation (*ib.*, 92); “our submission is that conflicts of law in matters of unjustifiable enrichment should be resolved in accordance with the law of the place in which the payment of the

depends upon the proper law of the contract.<sup>1</sup>

(c) *The contract must have become impossible of performance, or have been otherwise frustrated.*—The words

*"and the parties thereto have for that reason been discharged from the further performance of the contract,"*

do not add a further condition: they are declaratory and are a statutory affirmation of the legal effect of frustration.<sup>2</sup>

"Frustration is the term now in common use in cases in which the performance of a contract becomes impossible because its subject-matter has ceased to be available for the purpose for which both parties intended it to be used."<sup>3</sup>

The *subject-matter* of the contract may have perished; or it may still exist, but its condition has by some casualty been so changed as to be not available for the purposes of the contract . . .<sup>4</sup> Or the performance of the contract may have been for so long interrupted "by state interference or other similar overriding intervention" as to make it unreasonable for the parties to continue. Again, the object may exist and be available, but the *underlying purpose* contemplated by both parties—as in the *Coronation Cases*—has failed. Or "*a vital change of the law, either statutory or common law,*" operates on the circumstances, as "where the outbreak of war destroys a contract legally made before war, but which, when war breaks out, cannot be performed without trading with the enemy." *Death or incapacity* may frustrate a contract where "continued good health was essential to the carrying out of the contract." "The range of circumstances" is "wide and various."<sup>4</sup>

Impossibility discharges both parties in every case.<sup>5</sup> Frustration, says Viscount Simon, L.C.,

"kills the contract itself and discharges both parties automatically."<sup>6</sup> The Act applies where it becomes *illegal* to perform a contract: *Illegality* is merely one kind of frustrating event.<sup>7</sup>

money or the vesting of property occurs which constitutes the enrichment" (ib., 92, 93).

In his review of Glanville Williams' book in (1945), 61 L.Q.R. 97-99, at 98, Professor Gutteridge observes that "it would be unfair to reproach the legislator for adopting a solution which has, at least, the merit of limiting the operation of an English statute to disputes governed by English law."

<sup>1</sup> See McNair, 60 L.Q.R., at 161, 162, citing Dicey, *Conflict of Laws*, 155, 160.

<sup>2</sup> Williams suggests that the words mean that the frustrating event must be *capable of discharging obligations on both sides if such obligations exist* (at 29).

<sup>3</sup> Per Lord Porter in *The Constantine Case* [1942] A.C. 154, 198.

<sup>4</sup> Per Lord Wright in *The Constantine Case* [1942] A.C. 154, 183; *supra*, 410.

<sup>5</sup> *Contra*, Williams, 21, 22. Contrast Pollock on Contracts, 235.

<sup>6</sup> *The Constantine Case* [1942] A.C. 154, 163; *supra*, 531.

<sup>7</sup> The difficulties raised in Williams, 23, 24, do not seem to be real. Simond, J.'s doubt in *Re Banca Commerciale Italiana* [1942] Ch. 406, 412, "whether the doctrine of frustration of contract, with its incidents, strictly applies to a contract which is dissolved by the outbreak of war between the countries of the contracting parties"—does not seem to be well founded.

*Subsection (2).—Recovery of Prepayment, less Expenses*

“All sums paid or payable to any party in pursuance of the contract before the time when the parties were so discharged (in this Act referred to as ‘the time of discharge’) shall, in the case of sums so paid, be recoverable from him as money received by him for the use of the party by whom the sums were paid, and, in the case of sums so payable, cease to be so payable :

Provided that, if the party to whom the sums were so paid or payable incurred expenses before the time of discharge in, or for the purpose of, the performance of the contract, the court may, if it considers it just to do so having regard to all the circumstances of the case, allow him to retain or, as the case may be, recover the whole or any part of the sums so paid or payable, not being an amount in excess of the expenses so incurred.”

## NOTES

(a) *The Proviso*.—Whether any allowance for expenses be made to the recipient, and, if so, the amount of this allowance, will be entirely in the discretion of the court, i.e., the court or arbitrator actually hearing the case.<sup>1</sup> Save that the court may not order allowance or recovery of a sum in excess of expenses incurred, the discretion of the court is unfettered.<sup>2</sup> An appellate court may not substitute its own view of the proper amount, unless the trial judge has acted on wrong principles of law, e.g., by disregarding some of the circumstances of the case, or by including in “expenses” some element (such as loss of profit) that is not properly an expense, or unless he has given a decision that will “result in injustice.”<sup>3</sup>

<sup>1</sup> Section 3 (2).

<sup>2</sup> See *Luccioni v. Luccioni* [1943] P. 49, 51, per Scott, L.J.; for, as Lord Wright pointed out in *Evans v. Barilam* [1937] A.C. 473, 488, “a discretion which is unfettered by law must not be fettered by judicial interpretation of it.”

<sup>3</sup> See *Evans v. Barilam* [1937] A.C. 473, 480, 481, per Lord Atkin, and *British Fame v. Macgregor*; *The Macgregor* [1943] A.C. 197, per Lord Wright

“... it would require a very strong case to justify any such review of or interference with this matter of apportionment where the same view is taken of the law and facts. It is a question of the degree of fault, depending on a trained and expert judgment considering all the circumstances, and is different in essence from a mere finding of fact in the ordinary sense. It is a question not of principle or of positive findings of fact or law, but of proportion, of balance and relative emphasis, and of weighing different considerations. It involves an individual choice or discretion, as to which there may well be differences of opinion by different minds. It is for that reason, I think, that an appellate court has been warned against interfering, save in very exceptional circumstances, with the judge’s apportionment” (*ib.*, at 201).

Lord Buckmaster, in *The Otranto* [1931] A.C. 194, 204, stated the “accepted rule” :—

“Upon the question of altering the share of responsibility each has to take, this

(b) *Discretion of Court unfettered.*—It would not be right for the court to lay down any rules for the exercise of its discretion,<sup>1</sup> e.g., that the loss should be divided equally, i.e., that an allowance of only half of the expenses should be ordered,<sup>2</sup> as being “economically sounder” or more consistent with “natural justice.” The court, as such, has no views on “economics”; nor is “natural justice”—whatever, in this context, that term may mean, the statutory criterion, but “justice”—“having regard to all the circumstances of the case.”<sup>3</sup> The Law Revision Committee rejected the solution that the payee should be entitled to retain only one-half of loss directly incurred for the purpose of performing the contract.<sup>4</sup> It is true that, upon the construction of the Act, the report is not admissible in evidence.<sup>5</sup>

(c) “*Expenses.*” — “Expenses” means — expenses, not “expenses after deduction of gains resulting from those expenses,” or “net loss.”<sup>6</sup> “Net loss,” no doubt, is one of “the circumstances of the case.” The term includes a reasonable sum in respect of “overhead expenses,” and *work or services performed personally* by the party.<sup>7</sup> The term does not include “loss,” or loss of profit, or “*damage.*”<sup>8</sup> It has been defined as

“The charges, costs, items of outlay, incurred by a person in the execution of any commission or duty; . . .”<sup>9</sup>

(d) “*Incurring.*” — It is submitted that this statute, being ameliorative should receive an extensive, not a restrictive,

is primarily a matter for the judge at the trial, and unless there is some error in law or in fact in his judgment it ought not to be disturbed.”

See also, under a similar provision in Law Reform (Married Women and Tortfeasors) Act, 1935, *Daniel v. Rickett, Cockerell & Co., Ltd. & Raymond* [1938] 2 K.B. 322, 326, *per* Hilbery, J.; *Ingram v. United Automobile Services, Ltd.* [1943] 1 K.B. 612, 614, *per* MacKinnon, L.J.

<sup>1</sup> See note 2, *supra*, p. 684.

<sup>2</sup> *Contra*, Williams, at 35 *et seq.*

<sup>3</sup> “A modern court should realise what is its ideal, that of doing justice according to the actual facts, though on the lines of established law”: Lord Wright, *Legal Essays and Addresses*, 385.

<sup>4</sup> (1939), Cmd. 6889, at 7.

<sup>5</sup> See authorities cited in Williams, 37.

<sup>6</sup> *Contra*, Williams, 39.

<sup>7</sup> Section 1 (4); *infra*, 688.

<sup>8</sup> See *London County Council v. Montague Burton, Ltd.* [1934] 1 K.B. 360: where Avory, J., distinguishes “loss” and “expense” (at 364).

Contrast Indemnity Act, 1920, s. 2 (1) (b), conferring the right to compensation upon a person who “incurred or sustained any *direct loss or damage* to his business or property” through the exercise of emergency powers during the war of 1914, with Compensation (Defence) Act, 1939—which prescribes the measure of compensation for the taking possession of land or the requisition of other property, or the doing work on land in the exercise of emergency powers during the present war. Section 2 (1) (d) allows “a sum equal to the amount of *any expenses reasonably incurred* . . . for the purpose of compliance with any directions given on behalf of His Majesty in connection with the taking possession of the land.” See also ss. 4 (1) (e); 5 (1) (b); 6 (3).

<sup>9</sup> *New English Dictionary*, vol. III, 429.



interpretation. It may be argued that, strictly, you do not incur an *expense* until you have paid it. The phrase, however, should, it is thought, be construed to mean "incurred a *liability* for expenses."<sup>1</sup>

(e) *Expenses in, or for, the purpose of the performance of the Contract.*—The words "for the purpose of the performance of the contract" do not include expenses incurred in anticipation of, or in preparation for, a *possible* contract.<sup>2</sup> There must be a *contract*, but no doubt expenses which are proved to be exclusively referable to a particular contract, even though they were incurred before the contract was made, can be taken into account.

(f) *American Law.*—See *Restatement*, s. 468 (1), (2), (3), *infra*. Williston, s. 1972 *et seq.*; *infra*, 696 *et seq.*

The "value of performance," the *Restatement* declares, is "the benefit derived from the performance in advancing the object of the contract, not exceeding, however, a rateable portion of the contract price."

The measure of recovery, says Williston (s. 1977), is "The fair value of the performance which he has rendered," not exceeding "a rateable portion of the contract price, even if the part performance has been destroyed or has been of no pecuniary benefit to the defendant." Loss of profit is irrecoverable.<sup>3</sup>

#### *Subsection (3).—Recovery of Valuable Benefit*

"Where any party to the contract has, by reason of anything done by any other party thereto in, or for the performance of the contract, obtained a valuable benefit (other than a payment of money to which the last foregoing subsection applies) before the time of discharge, there shall be recoverable from him by the said party such sum (if any), not

<sup>1</sup> The General Claims Tribunal thought that expense is not "incurred" until it has been *paid*. Lord Patrick asked: "When you go to a tailor and order a suit, do you incur expenditure or a liability?" (Cited in editorial note (1945), 89 Sol. J. 87, from a case upon reg. 50B, para. 8, of Defence (General) Regulations, 1939, reported in *Estates Gazette*, 27th January, 1945. The paragraph provides compensation for "expenditure reasonably incurred" in making good damage caused in connection with the severance of fixtures.)

<sup>2</sup> With the above reservation, the author agrees with Williams' reasoning at 43, 44. See McNair, *loc. cit.*, 164, 165, who instances "the case of the householder who, having undertaken to erect a stand in order to view a procession and to provide luncheon, has bought timber for the purpose of the stand and food for the luncheon. If a manufacturer has incurred expense in installing special machinery for the purpose of performing the contract, this expenditure would presumably rank even though he has not begun to manufacture the goods that are the subject-matter of the contract."

<sup>3</sup> McNair refers to the recommendation of the Law Revision Committee that loss of profit should not be taken into consideration, but thinks that, since the Act does not refer to loss of profit, this is one of "the circumstances of the case" to which the court, by s. 1 (2) and (3), must have regard: *loc. cit.*, 167.

exceeding the value of the said benefit to the party obtaining it, as the court considers just, having regard to all the circumstances of the case and, in particular—

(a) the amount of any expenses incurred before the time of discharge by the benefited party in, or for the purpose of, the performance of the contract, including any sums paid or payable by him to any other party in pursuance of the contract and retained or recoverable by that party under the last foregoing subsection, and

(b) the effect, in relation to the said benefit, of the circumstances giving rise to the frustration of the contract."

### NOTES

(a) *Value of benefit obtained.*—A "benefit" is "obtained" when anything has been done by a party to the defendant's property, which has benefited it. It is immaterial that immediately afterwards the property was destroyed: the benefit, although not retained or turned to account, was nevertheless "obtained."<sup>1</sup> The "value" will *prima facie* be "a rateable proportion of the contract price."<sup>2</sup>

(b) *Expenses incurred by party benefited.*—*Prima facie*, the plaintiff will recover the value of the benefit obtained by the defendant less the expense incurred by the defendant. The court will not lay down any rigid "method" or "rules"—such as recovery of a rateable proportion of a "reasonable" price where the contractual price was unduly high.<sup>3</sup> If it would cost more to complete the work than the proportion of the contract price for the part unfinished, the court will not necessarily assess the "benefit" at an amount *less* than a "rateable proportion of the contract price."<sup>3</sup> Nor does it follow that a person may never recover *more* than a rateable proportion.<sup>4</sup>

In the interpretation of this statute *two principles*, it is submitted, are fundamental. *First*, the statutory adjustment of rights and liabilities of parties to frustrated contracts, it is true, is juristically based upon quasi-contract. This, however, does not mean that the Act must be construed so as to fit into a preconceived "basis of quasi-contractual recovery." *The Act* is the code. *Secondly*, the essence of this "equitable apportionment" is that the court must do justice "having regard to all the circumstances of the case." To prescribe the method or to lay down rules for the way in which the court

<sup>1</sup> See *Williams*, 48-50, citing Williston, s. 1975, *infra*, 702; Woodward, *Quasi-Contracts*, 180-184.

<sup>2</sup> See *Restatement*, s. 468 (2), Williston, s. 1977; *infra*, 698, 703.

<sup>3</sup> *Contra*, *Williams*, 53.

<sup>4</sup> *Contra*, *Williams*, 55, citing Woodward, 197.

should exercise its absolute discretion appears to the author to be erroneous in law and wrong in principle.

(c) *Effect of circumstances giving rise to frustration.*—The Act deals with the effects of frustration whatever the cause. The circumstances may indicate when the party benefited may be able to complete the work stayed by frustration.<sup>1</sup>

*Subsection (4).*—“ *Expenses* ” include “ *Overheads* ” and *Personal Services*

“ In estimating, for the purposes of the foregoing provisions of this section, the amount of any expenses incurred by any party to the contract, the court may, without prejudice to the generality of the said provisions, include such sum as appears to be reasonable in respect of overhead expenses and in respect of any work or services performed personally by the said party.”

#### NOTES

(a) “ *Overhead expenses.*”—These mean the general running costs of a business.<sup>2</sup> The “ *expense* ” incurred in, or for the purpose of, the performance of the contract, is not merely the *actual cost of the work done*. It includes a proportion of the running costs of the whole business—e.g., rent, rates, services, salaries, insurances—without which the work could not have been done.

(b) *Work or services performed personally.*—A person who *personally* does work or performs services does not “ incur expenses.” Hence it is necessary to provide that he may charge for work or services a sum which will reimburse him for time, and work or services.

(c) *Such sum as appears reasonable.*—The court hearing the case has the sole discretion. The word “ reasonable ” would appear to have the same meaning as “ just . . . having regard to all the circumstances of the case,” in s. 1 (2), and s. 1 (3).

*Subsection (5).*—*Insurance : when Relevant*

“ In considering whether any sum ought to be recovered or retained under the foregoing provisions of this section by any party to the contract, the court shall not take into account any sums which have, by reason of the circumstances giving rise to the frustration of the contract, become payable to that party under any contract of insurance unless there was an obligation to insure imposed by an express term of the frustrated contract or by or under any enactment.”

<sup>1</sup> McNair, *loc. cit.*, 166.

<sup>2</sup> “ Incurred in the production of a batch of articles apart from the prime cost of each (cf. *oncost*), or in the upkeep of plant and premises even where no work is being done ”: *New English Dictionary, Supplement*.

## NOTE

*Insurance generally, irrelevant and collateral.*— Upon the Third Reading in the House of Lords, Lord Wright observed :—

“ Where a party affected by frustration of a contract has insured, that may ordinarily be quite irrelevant as between the parties, but, if that has been done in pursuance of a term of the contract or under any enactment such as the War Damage Act, then the position is changed, and it is no longer irrelevant as between the parties, but is an essential part of the contractual relationship ; and the man who has, at his own trouble and expense, effected the insurance, ought to be entitled to enjoy such benefit as comes from that insurance.”<sup>1</sup>

*Subsection (6).—Benefit conferred on Third Party*

“ Where any person has assumed obligations under the contract in consideration of the conferring of a benefit by any other party to the contract upon any other person, whether a party to the contract or not, the court may, if in all the circumstances of the case it considers it just to do so, treat for the purposes of subsection (3) of this section any benefit so conferred as a benefit obtained by the person who has assumed the obligations as aforesaid.”

## NOTE

If, under the contract, A has assumed obligations in consideration of his co-contractor conferring a benefit upon B—*whether B is a party to the contract or not*—A may have to pay for this “ valuable benefit ” as if he had “ obtained ” it for himself.

“ Before the outbreak of war I undertook to accept your son as a farm pupil for a period of three years and instruct him in the business of dairy-farming, in consideration of the payment by you to me of £300 on the completion of the instruction. After two years he is called up under a National Service (Armed Forces) Act. He has already learned a good deal. I am entitled to recover from you under subsection (3) such sum as the court may consider to be just, having regard to the value of the training. If the sum of £300 had been paid to me in advance, you would (unless the contract is severable under subsection (4) of section 2) have a claim to repayment under subsection (2) of section 1, subject to my claim to retain up to the amount of any expense incurred by me.”<sup>2</sup>

<sup>1</sup> House of Lords, *Official Report*, vol. 128, 8th July, 1943, cols. 369, 370. See also the examples given by Viscount Simon, L.C., in moving the amendment: *ib.*, cols. 368, 369. And see McNair, *loc. cit.*, 167, 168.

The passages cited from *debates* are not, of course, receivable as evidence.

The Law Revision Committee had recommended that no regard should be had to amounts receivable under any contract of insurance (Cmd. 6009, at 8); *supra*, 625.

<sup>2</sup> McNair, *loc. cit.*, 168.

## SECTION 2.—APPLICATION OF THIS ACT

*Subsection (1).—Time of Discharge, on or after 1st July, 1943*

"This Act shall apply to contracts, whether made before or after the commencement of this Act, as respects which the time of discharge is on or after the first day of July, nineteen hundred and forty-three, but not to contracts as respects which the time of discharge is before the said date."

## NOTE

The Bill was ordered to be printed on 22nd June, 1943, and received a Second Reading on 29th June. Since the Bill was already well known in the commercial community it was thought right to afford the new statutory relief to existing contracts, if they were frustrated after a future date, viz., 1st July, 1943.<sup>1</sup>

*Subsection (2).—Where Crown a Party*

"This Act shall apply to contracts to which the Crown is a party in like manner as to contracts between subjects."

*Subsection (3).—Contractual Provision Paramount*

"Where any contract to which this Act applies contains any provision which, upon the true construction of the contract, is intended to have effect in the event of circumstances arising which operate, or would but for the said provision operate, to frustrate the contract, or is intended to have effect whether such circumstances arise or not, the court shall give effect to the said provision and shall only give effect to the foregoing section of this Act to such extent, if any, as appears to the court to be consistent with the said provision."

## NOTE

The parties—as before the Act<sup>2</sup>—may, by their contract, make what provision they please to adjust their rights and liabilities in the event of frustration.<sup>3</sup>

They may provide that a prepayment must be returned without deduction or that no part will be returned. The provision must be express. But "the true construction of the contract" depends not only on the terms, but on the material surrounding circumstances of a contract, of which parol evidence is admissible.<sup>4</sup>

<sup>1</sup> See the Lord Chancellor's speech : *Official Report*, vol. 128, col. 140.

<sup>2</sup> See *The Fibrosa Case* [1942] A.C. 32; at 55, *per* Lord Atkin: "It is always possible to provide for the risk of frustration"; at 76, *per* Lord Roche: "... they may make what contracts they think fit to provide in that event for the adjustment of the position between them." *Supra*, 639, 651.

<sup>3</sup> See *Restatement*, s. 468 (1) and (2), *infra*, "Except where a contract clearly provides otherwise, the value of performance is recoverable."  
And see Williston, s. 1972A, on the "assumption of risk."

<sup>4</sup> See *per* Vaughan Williams, L.J., in *Krell v. Henry* [1903] 2 K.B. 752, 754.

*Subsection (4).—Where Contract Severable*

"Where it appears to the court that a part of any contract to which this Act applies can properly be severed from the remainder of the contract, being a part wholly performed before the time of discharge, or so performed except for the payment in respect of that part of the contract of sums which are or can be ascertained under the contract, the court shall treat that part of the contract as if it were a separate contract and had not been frustrated and shall treat the foregoing section of this Act as only applicable to the remainder of that contract."

## NOTES

(a) *When is a contract severable?—Prima facie*, severance is the act of the parties: Salter, J., said:—

"The promise . . . must be on the face of the document a separate promise, a separate compact, the subject of separate consideration and accord, the performance of which is independent of the performance of any other promises which the promisor may have made . . . Whether it is separate or not depends on the language of the document. Severance, as it seems to me, is the act of the parties, not of the court."<sup>1</sup>

On the other hand, the subsection seems to signify that ultimately severance is a question for the court.

"The Act affords no guidance upon the tests of severance."<sup>2</sup>

(b) *Classification of severable contracts?—Williams* classifies *severable contracts* into those "infinitely severable" and those "made up of an agglomeration of entire parts."<sup>3</sup>

A contract "infinitely severable" is one which contains a promise, express or implied, to pay *pro rata*, or, if no remuneration is specified, to pay a *reasonable* remuneration. A severable contract "made up of an agglomeration of entire parts" is one in which "*separate considerations are specified*," each appropriated to different parts of performance, where complete performance is not a condition precedent to recovery.<sup>3</sup>

A contract, he says, is *entire*

"(a) if it is agreed that complete performance shall be a condition precedent to recovery on the contract, or

(b) if the consideration is a lump sum and is neither agreed to be paid *pro rata* nor split up and appropriated to different portions of the contract."<sup>3</sup>

<sup>1</sup> *Putman v. Taylor* [1927] 1 K B 637, 640. See also the judgment of Blackburn, J., in *Appleby v. Myers* (1867), L.R. 2 C.P. 651, 661, and *per Bovill, C.J.*, in *Whincup v. Hughes* (1871), L.R. 6 C.P. 78, 81. And see Williams, 64-72.

<sup>2</sup> McNair, *loc. cit.*, 170; and see examples quoted and questions raised.

<sup>3</sup> Williams, 64, 68-70. See also his essay, *Partial Performance of Entire Contracts I* (1941), 57 L.Q.R. 373-399, at 374, 382, 383.

This may afford a *prima facie* test : the power of the court is unfettered.

A "divisible contract" is thus defined in *Restatement of Contracts* :—

"A contract where, by its terms,

(1) performance of each party is divided into two or more parts,

(2) the number of parts due from each party is the same, and

(3) the performance of each part by one party is the agreed exchange for a corresponding part by the other party."<sup>1</sup>

*Subsection (5).—Contracts excluded from the Act*

"This Act shall not apply—

(a) to any charterparty, except a time charterparty or a charterparty by way of demise, or to any contract (other than a charterparty) for the carriage of goods by sea ; or

(b) to any contract of insurance, save as is provided by subsection (5) of the foregoing section ; or

(c) to any contract to which section seven of the Sale of Goods Act, 1893 (which avoids contracts for the sale of specific goods which perish before the risk has passed to the buyer), applies, or to any other contract for the sale, or for the sale and delivery, of specific goods, where the contract is frustrated by reason of the fact that the goods have perished."

#### NOTES

(a) *Charterparties*.—Where the ship or the goods have been lost, *advance freight* is irrecoverable.<sup>2</sup> Although the rule is "unsatisfactory in principle," said the Law Revision Committee, it has been "settled law for a long time past," and the practice of shipowners and insurers is "to some extent based on it." A change would be "inopportune and undesirable" *save as regards hire paid in advance under a time charterparty*, which should be recoverable, in the event of frustration, in the same way as other advance payments.<sup>3</sup> This *Recommendation* is embodied in s. 2 (5) (a) of the Act.

Any alteration would involve "substantial modification of the present insurance practice," which seemed "both unnecessary and undesirable." There was no "similar generally accepted rule" concerning hire payable under a *time charterparty*, or a

<sup>1</sup> Section 286 (e).

<sup>2</sup> *Byrne v. Schiller* (1871), L.R. 6 Ex. 319 ; *supra*, 598, 599.

<sup>3</sup> Cmd. 6009, Appendix B ; *supra*, 625. See also *The Fibrosa Case* [1943] A.C. 32, at 87, *per* Lord Wright ; at 74, *per* Lord Roche ; at 79, *per* Lord Porter.

Williams' analysis of the reasons why the rule as to advance freight survives *The Fibrosa Case* seems to be otiose (at 73, 74).

*charterparty by way of demise*.<sup>1</sup> A bill of lading is treated in the same way as a voyage charterparty.<sup>2</sup>

The decision in *The French Marine Case*<sup>3</sup> will accordingly cease to have effect where, on or after 1st July, 1943, a time charterparty has been frustrated.

(b) *Insurance*.—In the debate on the Third Reading, the Lord Chancellor said that a contract of insurance was not “ordinarily susceptible to the law of frustration”: as soon as the premium is paid and the risk attaches, “it is well established in law and custom that the premium is not returnable.” The subsection was inserted in the Act to make it quite clear that the Act does not apply to contracts of insurance.<sup>4</sup>

(c) *Contracts under Sale of Goods Act, 1893, s. 7*—The effect of frustration upon a contract for the sale of specific goods which perish before the risk has passed, is dealt with by s. 7 of the Sale of Goods Act, 1893. Lord Porter, in his speech in *The Fibrosa Case*,<sup>5</sup> after referring to s. 7, which deals with a case where the goods have perished before the contract was made and the contract is void *ab initio*, observes that s. 7 on the other hand

“treats of a contract validly made and continuing in existence until the goods perish. It is not void *ab initio*, but further performance is excused after the destruction has taken place. Yet the price is returnable because the consideration for the whole or the part unclaimed has wholly failed, as the section says, ‘without fault on either side’.”<sup>6</sup>

By s. 7, “where there is an agreement to sell specific goods, and subsequently the goods, without any fault on the part of the

<sup>1</sup> *Official Report* vol 128, 29th June 1943, col 141. Cmd 6009, Appendix B, p. 11, *supra* 626, 678, 679.

<sup>2</sup> McNair, *loc cit*, 171.

<sup>3</sup> [1921] 2 A C 494 *supra*, 601. Williams puts the points to the contrary, 76-78.

<sup>4</sup> *Official Report*, vol 128, 8th July, 1943, col 367.

See also the debate on the Second Reading in the House of Commons. *Official Report* vol 391, 23rd July, 1943, col 1346 *committee stage*, vol 391, col 1747, speech of the Attorney-General. See note 4, *supra*, 679.

See McNair, *loc cit*, 172.

See *Tyrra v Utcher* (1777), 2 Cowp 666, 668, 669, *per* Lord Mansfield. “there are two general rules established. The first is, that where the risk has not been run, whether its not having been run was owing to the fault, pleasure or will of the insured, or to any other cause, the premium shall be returned. Because a policy of insurance is a contract of indemnity. Another rule is, that if that risk of the contract of indemnity has once commenced, though it be only for twenty four hours or less, the risk is run, the contract is for the whole entire risk, and no part of the consideration shall be returned.” (See *Stevenson v. Snow* (1761), 3 Burr 1238, 1240).

<sup>5</sup> [1943] A C 32, 82, *supra*, 652.

<sup>6</sup> Williams (91-83) criticises this subsection and the restriction upon the scope of the Act. He regards the draftsman of the Sale of Goods Act as misled by the dictum of Blackburn, J., that both parties were excused by the burning of the music hall (82, Note 31).



seller or buyer, perish before the risk passes to the buyer, the agreement is thereby avoided."

The exclusion, observes McNair, may well be provided *ex abundanti cautela*.<sup>1</sup> Where the frustration arises not because the goods have perished but from any other cause, or where the agreement was for the sale of *unascertained* goods, the exclusion does not apply.

### SECTION 3.—SHORT TITLE AND INTERPRETATION

#### *Subsection (1).—Short Title*

"This Act may be cited as the Law Reform (Frustrated Contracts) Act, 1943."

#### NOTES

(a) *Title*.—The point of the words "*Law Reform*" is historical: to indicate that the statute is based upon a Report of the Law Revision Committee.

(b) *Frustrated Contract*.—This term, historically inaccurate, has come to stay. It is not the *contract* that is frustrated, but the *adventure* "or the commercial or practical purpose of the contract."<sup>2</sup> *The adventure frustrated, the contract is dissolved.*

The terms "frustrated contract" and "frustration of contract" are convenient. They are used in the speeches in *The Fibrosa Case*.<sup>3</sup>

In *The Denny Mott Case*, Lord Wright begins his speech:—

"... frustration of a contract, which, though as an expression criticised in the past, has now received legislative sanction in a recent Act . . ."<sup>4</sup>

#### *Subsection (2).—Interpretation*

"In this Act the expression 'court' means, in relation to any matter, the court or arbitrator by or before whom the matter falls to be determined."

#### NOTES

(a) *Absolute discretion of the court*.—The discretion conferred by the statute is the sole and absolute discretion of the court hearing the case and is not subject to review by an appellate

<sup>1</sup> *Loc. cit.*, 172. And see examples at 172, 173.

<sup>2</sup> See *per* Lord Wright, in *The Constantine Case* [1942] A.C. 132. The term has also been used in a more general, and, it is submitted, inexact sense, in *Maple Flock Co. v. Universal Furniture Products (Wembley), Ltd.* [1934] 1 K.B. 148, 158, *per* Hewart, C.J. (for Court of Appeal: Lord Hewart, C.J., Lord Wright and Slesser, L.J.): "... cases where the consequences of a single breach of contract may be so serious as to involve a frustration of the contract and justify rescission, . . ."

<sup>3</sup> [1943] A.C. 32; at 50, *per* Viscount Simon, L.C.; at 50, *per* Lord Atkin; at 58, *per* Lord Macmillan; at 68, *per* Lord Wright; at 56, *per* Lord Russell of Killowen; at 73, *per* Lord Roche; at 77, *per* Lord Porter.

<sup>4</sup> [1944] A.C. 265, 273; *supra*, 518.

court unless the judge has erred in law, or his decision is manifestly unjust.<sup>1</sup>

(b) *Discretion of the judge alone.*—It is submitted that the exercise of the statutory discretion is a matter for the judge, not for the jury.

Turning to the words of the statute, e.g., in the proviso to s. 1 (2)—that the court may allow a party to retain or recover *the whole or any part* of his expenses “if it considers it just to do so, having regard to all the circumstances,” these words seem more apt to confer a judicial discretion than to state the terms in which the judge is to direct the jury. The same point applies *a fortiori* to s. 1 (3)—a complicated subsection upon the recovery of valuable benefit. The same discretion is conferred in s. 1 (6).

Section 2 (3) and (4) are clearly for the judge: they involve questions on the construction of the contract. Indeed, it may well be argued that the provisions of the Act generally, which explicitly adjust the rights and liabilities of parties to “frustrated contracts,” involve questions of construction which are properly and entirely for the judge.

(c) *Two other possibilities.*—Two other constructions are possible. *First*, the effects of frustration—as the occurrence of frustration—may be a question of law for the judge upon the facts as found by the jury. *Secondly*, rules of court may be framed to exclude questions arising under the Act from the jury if, contrary to the present submission, they are matters for the jury.

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<sup>1</sup> See McNair, *loc. cit.*, 173, 174.

## CHAPTER XXVIII

### CONCERNING RESTITUTION IN AMERICAN LAW

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#### A. RESTATEMENT OF CONTRACTS

IN the *Report* on the rule in *Chandler v. Webster*<sup>1</sup> is set out the American law—as found in the *Restatement of the Law of Contracts*—which provides that, upon frustration of a contract, unearned benefits must be returned.<sup>2</sup> Those provisions—and the *Restatement of the Law of Restitution*<sup>3</sup>—have manifestly exercised

<sup>1</sup> (1939), Cmd. 6000, App. A, *supra*, 622.

<sup>2</sup> Section 468; *infra*, 697, 698.

<sup>3</sup> Adopted and promulgated by the American Law Institute at Washington, D.C., 8th May, 1936. The Reporters were Warren A. Leavey and Austen W. Scott. Part I is confined to quasi-contracts—rights of restitution enforceable either by action at law or by equitable proceedings. Part II deals with “constructive trusts.” Lord Wright reviews the *Restatement in Legal Essays and Addresses* (1939), 34–45. “Restitution,” says Lord Wright—speaking in high praise of the consummate architecture of this monumental edifice—“covers the area of what is often called quasi-contract, which again covers the area of what under the old pleading were called contracts implied by law” (at 36). Restitution is not concerned with damages or compensation, but with “remedies for what, if not remedied, would constitute an unjust benefit or advantage to the defendant at the expense of the plaintiff” (*ib.*). The basis of the action is not the loss suffered by the plaintiff but the benefit—of money or property—enjoyed by the defendant, which it is unjust for the defendant to retain. The broad principle is stated in s. 1 of *The Restatement of the Law of Restitution*: “A person who has been unjustly enriched at the expense of another is required to make restitution to the other.” *Comment a* observes: “A person is enriched if he has received a benefit . . . A person is unjustly enriched if the retention of the benefit would be

a considerable influence not only upon the Recommendations of the Committee, but also upon the scope and the language of the Law Reform (Frustrated Contracts) Act, 1913. American law—crystallised in the *Restatements* and in *Williston on Contracts*—will prove of great value and of high persuasive authority in elucidating the meaning of this statute<sup>1</sup>.

### 1. *Plaintiff Discharged; Value of Performance Recoverable*

"Except where a contract clearly provides otherwise, a party thereto who has rendered part performance for which there is no defined return performance fixed by the contract, and who is discharged from the duty of further performance by impossibility of rendering it, can get judgment for the value of the part performance rendered, unless it can be and is returned to him in specie within a reasonable time"<sup>2</sup>

This rule, states the *Comment*, covers cases where the *plaintiff* has been discharged by the impossibility of performing his own promise. When full performance is prevented by impossibility, "justice requires that the promisee should pay for what has been done to the extent of its value to the recipient, unless the part performance rendered can be and is returned."

— — — — —  
 unjust "Benefit" denotes any form of advantage" (*Comment b*) See also s. 108 (c)

See Levey and Scott *Restitution* (1938) 54 I Q R 2945, P H Winfield, *The American Restatement of the Law of Restitution* *ib.*, 529-542

Levey and Scott thus express the postulate underlying "Restitution" —

"A person has a right to have restored to him a benefit gained at his expense by another, if the retention of the benefit by the other would be unjust. The law protects the right by granting restitution of the benefit which otherwise would, in most cases, unjustly enrich the recipient" (*ib.*, at 32)

What is meant by 'unjust' depends upon an extensive set of individual rules (*ib.* at 34)

Professor Winfield says "I doubt whether any of the output of the American Law Institute is more important than this Restatement" (*ib.*, at 529)

<sup>1</sup> "I am satisfied that English lawyers will never fail to get help from the Restatements on any problem with which they have to grapple" *Legal Essays and Addresses*, *xiii*, and see *ib.*, 202-251

See also the exquisite address on 'The American Law Institute,' delivered in 1925 by the late Benjamin N. Cardozo (then Vice President) *Law and Literature*, New York, 1931 (at 121-141). Upon a "high emprise" the scholars of the Institute had ventured "Not for them those provisional and tentative formulas, those reservations and conditions, those shadings and softening, by which judges, made wary by many an ambush, have saved for hours of extremity an avenue of retreat. By the form and method chosen, the framers of the restatement have courted danger and defied it. In the fierce light that be it upon these categorical propositions, standing stark and unprotected in the open, there is room for truth, and for error, but seldom for half truth or truth unwilling to declare itself" (at 124, 125). Here "almost for the first time, at least on any scale so large, a multitude of these rules and principles, gathered from their setting and scientifically arranged, have been stated tersely, accurately, fully, with a definiteness of form approaching the pronouncements of a statute" (at 127)

<sup>2</sup> *Restatement*, s. 468 (1); see *Williston*, s. 1972, *infra*, 699

An interesting illustration given is this. A contracts to serve B for a month, for \$300. A begins performance, but after a fortnight becomes ill and is unable to work for the remainder of the month. A can get judgment for the value of the fortnight's work. This was not the case in English law<sup>1</sup>; the position is changed by the Act of 1943.

## 2. Defendant Discharged; Value of Performance Recoverable

"Except where a contract clearly provides otherwise, a party thereto who has rendered performance for which the other party is excused by impossibility from rendering the agreed exchange, can get judgment for the value of what he has rendered, less the value of what he has received, unless what he has rendered can be and is returned to him in specie within a reasonable time."<sup>2</sup>

In this case it is the *defendant* whose performance has here been excused by impossibility or frustration. But unless he returns what he has got, he must pay the value.

This rule is illustrated by a case where A contracts to render specific personal services for B in return for a motor car transferred by B to A. A becomes ill and cannot render the services. B can recover the value of the motor car unless it is returned to him.

## 3. Value of Performance

"The value of performance within the meaning of subsections (1, 2) is the benefit derived from the performance in advancing the object of the contract, not exceeding, however, a rateable portion of the contract price."<sup>3</sup>

The *loss* lies where it falls, states the *Comment*. "Neither party can be compelled to pay for the other's disappointed expectations. But, on the other hand, neither can be allowed to profit by the situation. He must pay for what he has received." If the recipient made an unwise contract, "that does not limit his duty to pay." If the contract was disadvantageous to the party who has rendered the performance, he cannot recover "on a more profitable basis than the contract affords."

One illustration given is the following: "A contracts to paint some bizarre frescoes in B's house, B promises to pay \$5,000 therefor. The frescoes will not add to the market value of the house. A dies after the frescoes have been half completed. Other artists can adequately complete the work and will do so for \$3,000. A's executors can recover \$2,000, since his work has to that extent advanced the object of the contract."

<sup>1</sup> *Appleby v. Myers* (1867), L.R. 2 C.P. 651; *Stubbs v. Holywell Rly. Co.* (1867), L.R. 2 Ex. 311, 314, *per* Martin, B. See chap. XXVII, *supra*, 681 *et seq.*

<sup>2</sup> *Restatement*, s. 468 (2); see Williston, s. 1972, *infra*, 699.

<sup>3</sup> *Restatement*, s. 468 (2); see Williston, ss. 1972, 1977, *infra*, 699, 703.

## B. WILLISTON: LAW OF CONTRACTS

1. *Quasi-Contractual Obligations upon Impossibility*

Among the consequences of impossibility, says Williston, may be these:—

(a) "A quasi-contractual obligation" to pay the value of part performance received;

(b) "a quasi-contractual obligation" by the party whose performance has become impossible, to pay the other party the net value of any advantage he has received from the non-performance of his impossible promise.<sup>1</sup>

2. *Recovery of Value of Performance*

Where a party excused by impossibility has partly performed his part of the contract, or where the other party has wholly or partly performed his part,

"justice requires the imposition of a quasi-contractual obligation on the party receiving such performance to pay its fair value."<sup>2</sup>

Between these two cases there is no distinction in principle:

"It should make no difference whether the party seeking quasi-contractual relief is the one who has failed, because of impossibility, to fulfil his contract or whether it is the other party who has rendered performance."<sup>3</sup>

Nor is the stage of performance material. It is immaterial whether the claim is in respect of money, land, goods, labour, materials or personal services; these distinctions in fact "have no significance in legal principle." The buyer should be allowed to return the property, if unused and uninjured<sup>4</sup>; if it has been used or injured without good cause, he should be liable for its value.<sup>5</sup>

3. *Assumption of Risk*

The plaintiff may, however, by his contract, have assumed the risk of impossibility.<sup>6</sup> "Unless a contrary intention

<sup>1</sup> Williston, s. 1909. For the meaning of "quasi-contract," see vol. I, s. 3. Rights arise under "quasi-contract," which are "created not by any promise or mutual assent of the parties, but [are] imposed by law on the defendant irrespective of, and sometimes in violation of, his intention."

See ss. 3, 1454. See also chap. XLIV.

<sup>2</sup> Williston, s. 1972.

<sup>3</sup> See *Restatement*, s. 468, *supra*, 697, 698.

<sup>4</sup> *Restatement of Restitution*, s. 66 (3). <sup>5</sup> *Ib.*, s. 25, *Comment b.*

<sup>6</sup> Williston, s. 1972A. Thus, the Rights of Restitution, as stated in *Restatement*, s. 468 (1) (2), apply "except where a contract clearly provides otherwise." See also s. 288 upon "*Frustration of the Object or Effect of the Contract*"—"unless a contrary intention appears": *Comment b.* And see s. 456, *Existing Impossibility*, upon the words, "where a contrary intention is manifested": *Comment c.* "Parties may bind themselves by contract to perform what is in fact impossible . . . Risk is not assumed by a promisor unless, on an interpretation of the contract in the light of accompanying circumstances and usages, an intention is manifested that it shall be assumed. Otherwise the risk is on the promisee." See also s. 457, *Supervening Impossibility*: *Comment b.*

clearly appears," the right of recovery in the United States is general, "whether the contract is for the sale of goods or land, or the rendering of services." Three questions, says Williston, may be material: *First*, and most important, "Did the defendant receive the benefit of the performance as it progressed?" If he did not, the presumption is against recovery. *Secondly* (but not of equal importance), if the plaintiff assumed the risk, he would "presumably have bargained for corresponding gain." *Finally* (in case of doubt), if the contract is ambiguous, *parol evidence* should be admissible to show the intention of the parties, that is, to prove that the contract did not apply to the event which has occurred and that the plaintiff is entitled to recover upon a quasi-contractual obligation.<sup>1</sup>

#### 4. *Recovery for Services*

If an employee, without the default of his employer, fails to fulfil an entire contract of service, he cannot recover *on the contract*.<sup>2</sup> (If, however, the contract is severable and he has performed a severable part, for such he may recover.)<sup>3</sup> But in the United States the employee or his representatives may recover *as upon a quasi-contractual obligation*

"the fair value of any services rendered by him for which, because illness or death stopped performance, he could not recover on the contract, unless the contract clearly makes the whole performance a prerequisite to the existence of an obligation to pay for any part of the work."<sup>4</sup>

"Quasi-contractual recovery does not depend on agreement, though it may be excluded by agreement."<sup>5</sup>

Similarly, where complete performance of a contract becomes impossible through the conduct of a third person "on whose co-operation the possibility of performance depends," or on account of illegality, the plaintiff may recover, says Williston, "the fair value of any part performance rendered while performance was still possible."<sup>6</sup>

#### 5. *Recovery of Payments or Property*

"If one party to a contract, at the time when further performance becomes impossible, has paid money or transferred

<sup>1</sup> Williston cites Keener, *Quant. Contracts*, 250. See also *per* Vaughan Williams, L.J., in *Krell v. Henry* [1903] 2 K.B. 740, 754; *supra*, 471.

<sup>2</sup> *Stubbs v. Holywell Rly. Co.* (1867), L.R. 2 Ex. 311, 314, *per* Martin, B.; *supra*, 651, note 5.

<sup>3</sup> Williston, s. 1973.

<sup>4</sup> *Ib.* Williston doubts the correctness of *Cutter v. Powell* (1795), 6 Term Rep. 320. This decision was repeatedly affirmed, for instance, by Blackburn, J., in *Appleby v. Myers* (1867), L.R. 2 C.P. 651, 600.

The law has been changed by the Law Reform (Frustrated Contracts) Act, 1943.

<sup>5</sup> Williston, s. 1973, note 4.

<sup>6</sup> *Ib.*, s. 1973. See *Restatement*, s. 468, *supra*, 698.

property to an amount that constitutes a greater proportion of the total performance which he undertook than the other party has performed, he should recover back the value of his disproportionate performance, unless by express provision of the contract he clearly assumed the risk of the supervening impossibility."<sup>1</sup>

The rule that applies upon a total failure of consideration should apply no less upon frustration of the contract:—

"One who has paid for goods which he never gets is entitled to recover the payment, even though the reason why performance is not made by the seller is excusable impossibility."<sup>2</sup>

The principle applies where property or services have been transferred and there has been failure of the agreed consideration.<sup>3</sup>

Where, however, performance has been *partly* rendered, and the consideration was *entire*, the English courts had refused to allow the party who made the indivisible payment, a recovery of the balance.<sup>4</sup> These decisions, says Williston, "seem clearly wrong."

"The difficulty of measuring the relief to which the plaintiff is entitled should not be a reason for giving him none. It is an obviously just obligation to return such a fraction of the consideration, or its value, as exceeds the value of the fraction of performance which the defendant has rendered."<sup>5</sup>

If the part performance can be returned in specie, this may be done and pecuniary liability may be avoided.<sup>6</sup>

<sup>1</sup> Williston, s. 1974. See *Restatement*, s. 468; cf. *Restatement of Restitution*, s. 153.

<sup>2</sup> Williston, s. 1974. See cases cited in note 7. Thus, money paid on account of a building which was destroyed by fire was recovered, subject to the builder's claim for labour and materials. Again, a patient paid a physician \$250 in advance for one month's treatment to be given at the physician's office. The patient became too ill to attend and receive treatment. The physician, having incurred no preparatory expense, must return the money. See *Restatement of Restitution*, s. 16, Illustrations 2 and 3.

<sup>3</sup> Williston, *ib.* In note 8, the following is cited from an Ohio case: "The act of God may properly lift from his shoulders the burden of performance, but has not yet been extended so as to enable him to keep the other man's property for nothing." *Restatement*, s. 357; *Restatement of Restitution*, s. 25, Comment b.

<sup>4</sup> Williston cites *Whincup v. Hughes* (1871), L.R. 6 C.P. 78. "Where a sum of money has been paid for an entire consideration, and there is only a partial failure of consideration, neither the whole nor any part of such sum can be recovered"; per Brett, J., at 86. See *Ferns v. Carr* (1885), 28 Ch. D. 409.

<sup>5</sup> Williston, s. 1974. In note 10, he refers to *McCammon v. Peck* (1895), 9 Oh. C.C. 599, "where a lawyer, after being paid in full for certain legal work, died when it was but partially completed. His estate was held liable for the excess which he had received over the fair value of what he had done." The reasoning of the Law Revision Committee ((1939), Cmd. 6009, at 6) followed the reasoning of Williston.

<sup>6</sup> Williston, s. 1974; *Restatement*, s. 468. *The Restatement of Restitution*, s. 159 (3), provides that "the method chosen by the defendant for determining the basis of accounting by him is the method to be used as the basis of accounting by the plaintiff." The defendant may "select from one of two measures of damages;



That principle has been recently reaffirmed—*obiter*—by a strong House of Lords,<sup>1</sup> but the law has since been changed by the Law Reform (Frustrated Contracts) Act, 1943.

### 6. Incomplete Work on Property Destroyed

Where without fault, a building or property is destroyed upon which a builder is under an indivisible contract with the owner, and both parties are excused from liability, the builder may by American law<sup>2</sup>—and now by English law<sup>3</sup>—recover on a *quantum meruit* for the value of the work done before the destruction.<sup>4</sup>

The right of recovery generally depends not upon the *retention* by the defendant of a benefit at the time when further performance became impossible, nor upon the fact that, prior to this, the defendant *received an advantage*. The point is that the defendant has received “something for which when completed he had agreed to pay a price.”<sup>5</sup> That he has derived no benefit from it is irrelevant.<sup>6</sup> In building contracts, where the work and labour and materials of the plaintiff have been added to the property of the defendant, the title to these, says Williston, “follows the title to the superior property and the defendant must pay the value of what he has received.”<sup>7</sup>

The same principle should apply where the plaintiff has contracted to do work upon *chattels*, and the property is destroyed before the work is completed.<sup>8</sup> In English law, until the Law Reform (Frustrated Contracts) Act, 1943, there was no provision whereby he could recover the value of the work.<sup>9</sup>

each party receive back the value rendered ; each party return the value received by him. Generally, the remedy of rescission is conditional on restoration by the plaintiff, either in specie or in value.” Williston, s. 1974, note 10.

<sup>1</sup> In *The Fibrosa Case* [1943] A.C. 32, at 72, 79, *per* Lord Wright and Lord Porter.

<sup>2</sup> Recovery in a few of the United States, however, is denied. See cases cited in note 4 of Williston, s. 1975.

<sup>3</sup> See *Appleby v. Myers* (1867), L.R. 2 (‘P. 651 ; *The Madras* [1898] P. 90, 94 ; *Forman & Co. Proprietary, Ltd. v. The “Liddisdale”* [1900] A.C. 190, 202. The law has been changed by the Law Reform (Frustrated Contracts) Act, 1943.

<sup>4</sup> Williston, s. 1975 ; *Restatement*, s. 468 ; *supra*, 697, 698.

<sup>5</sup> Williston, s. 1976.

<sup>6</sup> Williston contrasts Keoner (*op. cit.*, 254), who supported these decisions on the ground that the defendant had received no benefit, with Woodward (*op. cit.*, 117) who maintains :—

“every unit or particle of material, whether in accordance with the defendant’s wish is irrevocably appropriated to the improvement of the defendant’s property, and every stroke of labour performed upon such material or upon the property improved, constitutes a benefit to the defendant, and the failure of the defendant to use or occupy such improvement—to enter into the ‘enjoyment’ of it—clearly cannot affect the right of recovery.”

<sup>7</sup> See note 8.

<sup>8</sup> Several New York decisions (cited in s. 1976, note 10) allow recovery.

<sup>9</sup> *Appleby v. Myers* (1867), L.R. 2 C.P. 651, 659, *per* Blackburn, J.

### 7. *Excusable Impossibility ; Measure of Damages*

It is the rule in the United States that where full performance of a contract has been prevented by excusable impossibility, and neither the plaintiff nor the defendant has been in fault, the plaintiff may recover

"the fair value of the performance which he has rendered."<sup>1</sup>

This goes further than a liability upon the defendant to return the *benefit* which he has received<sup>2</sup> : *First*, even if the part performance has been destroyed and has proved to be of *no benefit* to the defendant, the plaintiff may recover its value. *Secondly*, the part performance need not have been of *pecuniary advantage to the defendant*. Williston gives two examples. A agrees, for an inclusive figure, to take a course in shorthand ; before the course is completed, he becomes paralysed. Liability on the contract is excused, but a quasi-contractual obligation remains. Again : B contracts with C to render services to D ; before he can receive these services in full, D dies. B may recover from C the value of the part performance, even though it is of no benefit to C.<sup>3</sup>

The measure of recovery on a *quantum meruit* or *quantum valebat* should "prima facie be such a proportion of the price as the work which the plaintiff has done bears to the full amount of the work for which the contract provided."<sup>4</sup>

No damages for non-fulfilment of the remainder of the contract may be deducted ; thus *loss of profit* under a contract which becomes impossible must be borne by the promisee.<sup>5</sup> But recovery must not exceed "a rateable portion of the contract price."<sup>6</sup> The plaintiff cannot recover on a more profitable basis than the contract affords.

<sup>1</sup> Williston, s. 1977. See the definition of "value of performance," in *Restatement*, s. 468 (3) ; *supra*, 698.

<sup>2</sup> See *Restatement*, s. 348. Restitution normally implies that a benefit has been received. But see *Comment a*. Benefit includes "service or forbearance rendered at the defendant's request . . . Judgment will be given for the value of the service so rendered, even though the product created thereby has been lost or destroyed by the defendant, and even though there never was any product created by the service that added to the wealth of the defendant."

<sup>3</sup> Williston, s. 1977. Williston cites *Moore v. Robinson* (1879), 92 Ill. 491, where "the defendant contracted for the services of an attorney to defend his brother. The brother ran away, and the court held that though the attorney was not entitled to the sum promised by the contract, he was entitled to a fair compensation for such services as he had rendered." *Restatement*, s. 356 ; *Restatement of Restitution*, s. 110, *Comment b*.

<sup>4</sup> See *Restatement*, s. 468, *Comment d*, and Illustration 8. A employs B to do certain work for \$1,000, a low figure. When the work is half done, B dies. No other competent person would have done the whole work for less than \$1,600. B's executor can recover \$500.

<sup>5</sup> Williston, s. 1977.

<sup>6</sup> See *Restatement*, s. 468 (3), *Comment d*. Williston points out (s. 1977, note 15) that this formulation is based upon the statement of Cardozo, C.J., in *Buccini v. Paterno Const. Co.* (1930), 253 N.Y. 256 259, 170 N.E. 910, 911 : "The question

8. *Benefits received from Third Persons*

A party, excused by impossibility from performing his promise, may have received a benefit not directly conferred by the other party. Thus, where the owner of land is bound by restrictive covenants, and the land is taken by "eminent domain" and used without restriction, the covenantor, says Williston, should not be allowed to retain the whole compensation based upon the value of unrestricted land.<sup>1</sup>

The same principle is involved where a ship under charter is requisitioned and the Government pay a *greater* hire than the charter stipulated. It is to the owner's interest to be relieved of the charter and to retain the full amount paid by the Government. To avoid a result "so palpably unjust," it was held in the *Tamplin Case*,<sup>2</sup> says Williston, that the temporary interruption did not dissolve the charter; the charterer, while continuing to pay the hire due under the charter, could himself receive the Government payments.<sup>3</sup>

The decision, observes Williston, seems "unsatisfactory . . . It can hardly be doubted that the owner was, without his fault, prevented for a time so material as to be essential, from performing his contract. If so, it should be discharged."<sup>4</sup> The decision would mean that if the Admiralty hire had been *less* than the hire reserved in the charter, the charterer must still continue his payments to the owner. And suppose that the Government had taken over the ship permanently?

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to be determined is not the value of the work considered by itself and unrelated to the contract. The question to be determined is the benefit to the owner in advancement of the ends to be promoted by the contract."

B contracted with the company to decorate the ballroom and a swimming pool. The decorations called for the exercise of artistic skill; all decorative figured work was to be done by B personally. B died while the work was in progress. Further performance was at an end, but the owner was liable for benefits received. "The value proportionately distributed," said Cardozo, C.J., "may be greater than the contract price. Even so, the price, and not the value, will be the maximum beyond which the judgment may not go."

<sup>1</sup> Williston, s. 1978.

<sup>2</sup> [1916] 2 A.C. 397, 410. In note 6, the following is cited: "If the charterers were right, it would no doubt follow that they would be entitled to retain the largely increased monthly payment which the government has been making for the use of the steamer, paying to the owners only the monthly sum stipulated for by the charterparty. If the owners, on the other hand, were right, the charterers would be able to claim compensation from the Government for loss of rights under the terms of a general proclamation issued by the latter, but the owners would be the persons entitled to the hire paid by the Admiralty for the steamer to the use of which the charterers would no longer be entitled."

<sup>3</sup> Williston, s. 1978.

<sup>4</sup> Williston, s. 1978, referring to the *Bank Line Case* [1919] A.C. 435, and the *Hirji Mulji Case* [1926] A.C. 497, and quoting a remark of Learned Hand, J.: "I should myself incline to think that any requisition ought *prima facie* to terminate the charterparty": *Earn Line S.S. Co. v. Sutherland S.S. Co.* (1919), 264 F. 126, 134. Williston also cites *The Isle of Mull* (1921), 278 F. 131, 136.

American decisions hold that upon an indefinite embargo or requisition the adventure is frustrated, and the contract is dissolved, and that neither party need account to the other. In the opinion of Williston, although the charter is at an end, it is unjust for the owner to secure "the profit of the increased compensation by the Government."<sup>1</sup>

"A better solution of the difficulty," he says, "... seems to be to absolve the parties from liability on their promises, but to hold the owner liable on principles of quasi-contract for any benefit which he may receive from the dissolution of the contract, that is, for any excess of the Government payment over the hire reserved in the charter-party."<sup>2</sup>

<sup>1</sup> See s. 1978, note 8. This was the decision in *Earn Line S.S. Co. v. Sutherland S.S. Co.*, *supra*, affirmed *sub nom. The Claveresk* (1920), 264 F. 276, where the court would not consider whether the charterer was entitled to apportionment of the additional compensation paid by the Government. And see *The Isle of Mull*, *supra*, where the court held that the requisition dissolved the charterparty and that the owner was under no duty to account for the excess hire paid by the Government.

<sup>2</sup> Williston, s. 1978. He refers to the decision of the lower court (which was reversed), in *The Isle of Mull* (1919), 257 F. 798, where Rose, J., held that the charterparty was not frustrated upon requisition and that the charterer was entitled to the difference between the chartered rate and the rate paid by the Admiralty. "The decision achieves a just result" (note 8). He cites with approval *Chinese Mining & Engineering Co., Ltd. v. Sale & Co.* [1917] 2 K.B. 599, 605, where Rowlatt, J., held that if, in a case where requisition does not terminate the charter, the Admiralty use the ship in a more extensive and onerous way than the charterparty had authorised, the Admiralty hire is divisible between the owner and charterer in proportion to their respective interests in the ship. In the *Tamplin Case* [1916] 2 A.C. 397, 428, Lord Parker had suggested, *obiter*, the need for apportionment. See also *per* Lord Loreburn, *ib.*, at 405: the owner will be accountable to the charterer for any excess, and in the event of loss to either party, each party will lose according to the extent of the benefit of which he has been deprived. *Sed quare*.

1. See *Effect of a Requisition on Charterparty Relations* (1926), 40 Harv. L. Rev., 305-309. "Where the period of requisition is so short as not to excuse future performance by the charterer, his obligation to pay hire remains" (at 308) citing *Modern Transport Co., Ltd. v. Duneric S.S. Co.* [1917] 1 K.B. 370. The writer states (at 309) that English courts have apportioned the Admiralty hire between owner and charterer, citing *Dominion Coal Co., Ltd. v. Maskinonge S.S. Co.* [1922] 2 K.B. 132, where McCordie, J., held that the charterer was entitled to recover the excess of Government payments over charterparty hire for the years during which the steamship was under requisition. But where the delay is so long as to excuse the charterers, the owner can retain the full Admiralty hire: *Heilgers and Co. v. Cambrian Steam Navigation Co., Ltd.* (1917), 33 T.L.R. 348, *per* Horridge, J. See also *London-American Maritime Trading Co. v. Rio de Janeiro Tramway, Light and Power Co.* [1917] 2 K.B. 611, 615, *per* Rowlatt, J.: "The parties must share the benefit or compensation according to their interests..." The time charter had provided that if the ship were lost, hire would cease on the day of her loss. She was subsequently requisitioned on terms that if she were lost by war risks, the Admiralty would pay compensation on her ascertained value. She was so lost, and Rowlatt, J., held that the compensation belonged wholly to the owners.

2. But see Scrutton, art. 30, pp. 121, 122: "It is not easy to see why the charterer should have any interest in the hire paid by the Government, if it be

remembered (i) that the charter is a contract by which the shipowner during a certain period agrees to do certain work for the charterer, but is not a contract under which the charterer has any interest in the ship, except that it is the vehicle with which the shipowner is to do the agreed work; (ii) that by the charter the charterer agrees to pay hire during the agreed period even if the shipowner by reason of restraint of princes is not doing his promised work; and (iii) that the 'requisition' meant that the shipowner, under compulsion, agreed to do work for the Government instead of doing work for the charterer."

And in note (5), 122, it is observed:—

"Put otherwise, may not the logical result be that, if the charter was not frustrated, the shipowner was entitled to receive and keep hire from the Government, and also to receive and keep hire from the charterer? If this be right, the view of the minority in the House of Lords" [sc. in the *Tamplin Case* [1916] 2 A.C. 397: per Viscount Haldane and Lord Atkinson], "that the charter was frustrated, would seem to be supported."

He cites, in particular, *Dominion Coal Co., Ltd. v. The Lord Curzon S.S. Co., Ltd.* (1922), 12 Ll. L. Rep. 490. The charterers, a large coal-producing company in Canada (whose practice was to charter vessels on long-time charters for the St. Lawrence season), had chartered from the defendants the *Lord Strathcona* for ten years from April, 1914, with options to extend. Two questions arose: (1) Did certain periods of requisition dissolve the charterparty by frustration? (2) Were the plaintiffs entitled to the difference between the charterparty hire and the requisition hire? The charterparty rate was 4s. 6d. per ton. The ship had been under requisition twice: once, during the St. Lawrence season of 1915; and again, from 1917 till 1919. The plaintiffs claimed, upon the basis that there was no frustration, the difference between the charterparty hire and the requisition hire. Bailhache, J. (following the decision of Rowlatt, J., in the *Chinese Engineering Case* [1917] 2 K.B. 599), apportioned the hire upon the basis of what was "fair and reasonable": as to one-third to the owners, and two-thirds to the charterers. Although apportioning, he thought the other way. Rowlatt, J.'s method involved "an elaborate, difficult, almost impossible calculation": (1922), 12 Ll. L. Rep., at 492. The money belonged to the owners; they were not accountable to the charterers. Against these strong views, however, Bailhache, J., felt constrained to follow the decisions, and the dicta of Earl Loreburn and Lord Parker in the *Tamplin Case* [1916] 2 A.C. 397, 405, 428, and to give judgment for the plaintiffs.

Upon apportionment of hire, no "antiquity of decision" exists for the application of the maxim, *communis error facit jus* (cited by Allen, *Law in the Making*, 274)—one of the two essentials specified by Jessel, M.R., in *Ex parte Willey* (1883), 23 Ch.D. 118, 127, 128; see also *Bourne v. Keane* [1919] A.C. 815, 874, per Lord Buckmaster.

3. These decisions of Rowlatt, Bailhache and McCardie, JJ., it is respectfully submitted, are wrong. This conclusion appears to follow from the reasoning in *The Fibrosa Case* [1943] A.C. 32, 49, where the possibility of "equitable apportionment of prepaid moneys" was rejected, *obiter*.

4. The problem is specifically dealt with by Compensation (Defence) Act, 1939, s. 5 (1) (2). The statutory compensation for taking space or accommodation in ships or aircraft is payable to the person who, at the date of requisition, is "the owner"—defined, for this purpose, in s. 17 (1) as "the person entitled to sell the property, it being assumed not to be subject to any mortgage, pledge, lien or other similar obligation."

## APPENDICES

### I. DEFEAT OF GERMANY AND JAPAN

#### 1. UNCONDITIONAL SURRENDER OF GERMANY

On Tuesday, 8th May, 1945, the Prime Minister (Mr. Churchill) announced to the House of Commons that on 7th May, at 2.41 a.m., at General Eisenhower's headquarters, at Rheims, General Jodl, the representative of the German High Command and of Grand Admiral Doenitz, the designated head of the German State, signed the act of unconditional surrender of all German land, sea and air forces in Europe to the Allied Expeditionary Force, and, simultaneously, to the Soviet High Command.

*"Hostilities will end officially at one minute after midnight to-night, Tuesday, 8th May . . ."*<sup>1</sup>

#### 2. ASSUMPTION OF SUPREME AUTHORITY BY THE GOVERNMENTS OF THE UNITED KINGDOM, THE UNITED STATES, THE U.S.S.R., AND FRANCE

On 5th June, 1945, at Berlin, the military representatives of the four Powers, signed the *Declaration on the Defeat of Germany*.<sup>2</sup>

The four allied Governments

*"will take such steps, including the complete disarmament and demilitarization of Germany, as they deem requisite for future peace and security."*<sup>3</sup>

#### 3. UNCONDITIONAL SURRENDER OF JAPAN

On 15th August, 1945, the Prime Minister (Mr. Attlee) announced to the House of Commons that at midnight of 14th August the Emperor of Japan agreed to command all military, naval, and air authorities of Japan to cease active operations and to surrender arms.<sup>4</sup>

On Sunday, 2nd September, 1945, in Tokyo Bay, the *Instrument of Unconditional Surrender* was signed.<sup>5</sup> The Japanese Government agreed to carry out the provisions of the Potsdam declaration.<sup>6</sup>

The President of the United States did not think that the time had yet arrived for "the proclamation of the cessation of hostilities, much less the termination of the war."<sup>7</sup>

#### 4. PREPARATION OF TREATIES OF PEACE

The Tripartite Conference of Berlin agreed to establish a *Council of Foreign Ministers* representing the five principal Powers—the United Kingdom, the Union of Soviet Socialist Republics, China, France and the United States—which should be authorised to draw up, with a view to their submission to the United Nations, treaties of peace with *Italy, Rumania, Bulgaria, Hungary and Finland*. The Council is also to prepare a peace settlement for Germany "to be accepted by the Government of Germany when a government adequate for the purpose is established."<sup>8</sup>

### II. CHARTER OF THE UNITED NATIONS

On 26th June, 1945, at San Francisco, the representatives of *fifty allied nations*,

<sup>1</sup> *Official Report*, vol. 410, col 1807.

<sup>2</sup> *Ib.*, art. 18 (a).

<sup>3</sup> See *The Times*, 3rd September, 1945, for the eight articles.

<sup>4</sup> Issued on 26th July, 1945. For text, see *The Times*, 3rd August 1945.

<sup>5</sup> President Truman's *Message to Congress*; *The Times*, 7th September, 1945.

<sup>6</sup> See *Official Report*, 9th October, 1945, vol. 414, cols. 35-41.

<sup>7</sup> Cmd 6648, 8th June 1945.

<sup>8</sup> *Official Report*, vol. 413, col. 48.

"determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, . . .", signed the Charter of the United Nations, thereby establishing an international organisation known as the United Nations.<sup>1</sup>

The two main purposes of the United Nations are "to maintain international peace and security," and "to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character . . ."<sup>2</sup>

"All members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."<sup>3</sup>

The United Nations will have six principal organs:—

A General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, an International Court of Justice, and a Secretariat.<sup>4</sup>

(i) *The General Assembly*, consisting of all the members of the United Nations (each member having not more than five representatives), may discuss any matter within the scope of the Charter and may make recommendations to the members or to the Security Council<sup>5</sup>—except when the Security Council is exercising its functions in respect of them.<sup>6</sup> The Assembly will initiate studies and make recommendations for the purpose, *inter alia*, of

"encouraging the progressive development of international law and its codification."<sup>7</sup>

(ii) *The Security Council* will consist of eleven members, five of whom—China, France, U.S.S.R., the United Kingdom and the United States—are permanent members. The Assembly will elect six other non-permanent members to be elected for two years. Each member has one representative.<sup>8</sup> The Security Council has

"primary responsibility for the maintenance of international peace and security . . . in accordance with the purposes and principles of the United Nations."<sup>9</sup>

The Council will function continuously and will hold periodic meetings.<sup>10</sup> Provisions are made for the *peaceful settlement of disputes*.<sup>11</sup> *Threats to the Peace, Breaches of the Peace and Acts of Aggression* may be dealt with in a variety of ways and ultimately by armed forces which all members undertake to make available to the Security Council on its call and in accordance with special agreements to be negotiated by the Security Council.<sup>12</sup>

(iii) *The Economic and Social Council* will consist of eighteen members of the United Nations elected by the General Assembly, six to be elected yearly for a term of three years, each member having one representative.<sup>13</sup> Their function is to initiate studies on international, economic, social, cultural, educational, health and related matters, and to make recommendations on them, to prepare draft conventions and to call international conferences.<sup>14</sup>

(iv) *The Trusteeship Council* will administer and supervise such "non-self-governing territories"—"trust territories"—placed, by "trusteeship agreements," under its ægis. "The Trusteeship system"<sup>15</sup>

<sup>1</sup> For full text of the 19 chapters containing 111 articles, see *The Times*, 27th June, 1945, and *Documents Adopted by the United Nations Conference, San Francisco, 28th June, 1945*, H.M. Stationery Office, 1945. See also *A Commentary on the Charter of the United Nations* (1945), Cmd. 6866.

<sup>2</sup> Article 1, paras. 1 and 2.

<sup>3</sup> Article 7, para. 1.

<sup>4</sup> Article 12.

<sup>5</sup> Articles 23–54, Article 23.

<sup>6</sup> Article 28.

<sup>7</sup> Chapter VII, arts. 39–51 art. 47

<sup>8</sup> Article 62,

<sup>9</sup> Article 2, para. 3.

<sup>10</sup> Articles 9–22. Articles 9 and 10.

<sup>11</sup> Article 13, para. 1 (a).

<sup>12</sup> Article 24, paras. 1 and 2.

<sup>13</sup> Chapter VI, arts. 33–38.

<sup>14</sup> Articles 61–72; art. 61.

will apply to the following territories as are placed thereunder by trusteeship agreements: (a) mandated territories; (b) territories detached from enemy States as a result of the Second World War; (c) territories placed under the system by States responsible for their administration.<sup>1</sup>

This Council will consist of (a) "administering authorities"; (b) such permanent members of the Security Council who are not "administering authorities"; (c) as many other members elected by the Assembly for three-year terms to ensure that the membership is equally divided between those States which administer trust territories and those which do not. Each member will designate a "specially qualified representative."<sup>2</sup>

(v) *The International Court of Justice* will be "the principal judicial organ" of the United Nations, functioning in accordance with a statute annexed which is based upon the Statute of the Permanent Court of International Justice and forms "an integral part of the present Charter."<sup>3</sup> All members of the United Nations are *ipso facto* parties to this Statute. A non-member State may become a party on conditions determined by the Assembly upon the recommendation of the Security Council.<sup>4</sup> Each member undertakes to comply with the Court's decision in any case to which it is a party. If any party fails to perform its obligations under a judgment of the Court, the other party may go to the Security Council which may decide upon measures to effectuate the judgment.<sup>5</sup> Members may entrust the solution of their differences to other tribunals under existing or future agreements.<sup>6</sup> The Assembly or the Security Council—or other organs, or "specialized agencies" of the United Nations (if so authorised by the Assembly)—may, on any legal question, request an advisory opinion.<sup>7</sup>

(vi) *The Secretariat*.—The Secretary-General will be appointed by the Assembly upon the recommendation of the Security Council.<sup>8</sup>

<sup>1</sup> Articles 71-91, arts 75-77

<sup>2</sup> Article 86

<sup>3</sup> Articles 92-96, art 92. *The Statute*, containing four chapters and seventy articles, is set out in *Documents, supra*; also in Cmd 6666

The Court will be composed of "a body of independent judges elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognised competence in international law" (art 2). It will consist of fifteen members—no two nationals of the same state (art 3)—elected independently, by the Assembly and by the Security Council who obtain an absolute majority of votes in both bodies (art 10)—from a list of persons nominated by the national groups in the Permanent Court of Arbitration (arts 4 and 9). They will be elected for nine years and may be re-elected, out of the judges first elected, five judges (chosen by lot by the Secretary-General) will hold office for three years and five more for six years (art 13). When engaged on the business of the court they will enjoy diplomatic privileges and immunities (art 19). The seat of the Court will be at *The Hague*, but the Court may sit elsewhere whenever the Court considers it desirable (art 22). The Court, except during vacations, will remain permanently in session (art 23). It may sit in chambers composed of three or more judges, for dealing with particular categories of cases (art 26), and shall form annually a chamber composed of five judges which, at the parties' request, may determine cases by summary procedure (art. 29).

Only States may be parties in cases before the Court (art 34). The jurisdiction comprises all cases referred to it by the parties and all matters provided for in *The Charter* or in existing treaties or conventions (art 36). The Court, whose function is to decide in accordance with international law disputes submitted, shall apply (a) *International Conventions*, establishing rules recognised by the contending States (b) *International custom*, evidencing a general practice accepted as law; (c) "The general principles of law recognised by civilized nations" (d) Subject to art. 59, judicial decisions and "the teachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of rules of law" If the parties agree, the Court may decide a case *ex aequo et bono* (art 38).

The official languages will be French and English (art 39). The hearing will be public unless the Court decide, or the parties demand, otherwise (art 40). The decision has no binding force except between the parties and in respect of that particular case (art 59). The judgment is final (art. 60), but may be revised on the discovery of some decisive fact unknown at the date of judgment, to the Court and the claimant (art. 61).

This statute may be amended by the same procedure as the Charter (art. 69)

<sup>4</sup> Article 93.

<sup>5</sup> Article 94.

<sup>6</sup> Article 95.

<sup>7</sup> Article 96. See *Statute of The International Court of Justice*, arts. 65-68.

<sup>8</sup> Articles 97-101; art. 97.



Each member of the United Nations will respect his exclusively international character.<sup>1</sup>

*Amendments to the Charter* will come into force when adopted by two-thirds of the Assembly and ratified by two-thirds of the members of the United Nations, including all permanent members of the Security Council.<sup>2</sup> A conference of the members of the United Nations to review the Charter may be held at a date and place fixed by two-thirds of the Assembly, and by a vote of any seven members of the Security Council. Any alteration of the Charter recommended by a two-thirds vote of the conference shall take effect when ratified by two-thirds of the members of the United Nations including all the permanent members of the Security Council. If such a conference has not been called before the *tenth annual session* of the Assembly, the *proposal to call a conference shall be placed on the agenda* of the Assembly; the conference shall be held if so decided by a *simple majority of the Assembly and by a vote of any seven members of the Security Council*.<sup>3</sup>

*Ratification and Signature*.—The Charter will be *ratified* by signatory States according to their constitutional processes. Ratifications will be deposited with the Government of the United States. *The Charter will come into force upon the deposit of ratifications by China, France, U.S.S.R., the United Kingdom, the United States and by a majority of the other signatory States*.<sup>4</sup>

The governments represented at San Francisco established a *Preparatory Commission*—consisting of one representative of each signatory Government—to make provisional arrangements for the first sessions of the bodies to be set up under the Charter. The seat of the Commission is in London and the Commission will cease upon the election of the Secretary-General.<sup>5</sup>

### III. THE TENANCY AGREEMENTS (END OF THE WAR IN EUROPE) ORDER, 1945

(See p. 35)

His Majesty, by Order in Council made under the Validation of War-Time Leases Act, 1914, s. 2 (2), has declared that, *for the purposes of the construction of any tenancy agreement* (unless the context requires or it is shown by admissible evidence that the agreement should be otherwise construed),<sup>6</sup> *9th May, 1945*, shall be treated as the date of the end of the war and of hostilities as respects the States in Europe with which His Majesty has been at war at any time since 3rd September, 1939, and of the emergency (not being defined by reference to any statute), occasioned thereby.<sup>7</sup>

### IV. TENANCY AGREEMENTS (END OF THE WAR WITH JAPAN) ORDER, 1945

(See p. 35)

His Majesty, by Order in Council made under the Validation of War-Time Leases Act, 1914, s. 2 (2), has declared that, *for the purposes of the construction of any tenancy agreement* (unless the context requires or it is shown by admissible evidence that the agreement should be otherwise construed),<sup>8</sup> *15th August, 1945*, shall be treated as the *date of the end of the war and of hostilities, and of the signing of an armistice, with Japan, and of the emergency* (not being defined by reference to any Act of Parliament) occasioned by the said war and hostilities.<sup>9</sup>

<sup>1</sup> Article 100.

<sup>2</sup> Article 108.

<sup>3</sup> Article 109.

<sup>4</sup> Article 110. By 10th October, 1945, the Charter had been ratified by the principal Powers and by twenty-seven other States (*The Times*, 11th October, 1945, p. 2; Mr. Stettinius).

<sup>5</sup> For the approval of the ratification by the United Kingdom, see House of Commons, *Official Report*, vol. 413, 22nd and 23rd August, 1945, cols. 660-755, 859-947; House of Lords, *Official Report*, vol. 137, cols. 104-150, 158-186.

<sup>6</sup> *For Agreement*, see *Documents*, *supra*.

<sup>7</sup> See *supra* 35, notes 2 and 3.

<sup>8</sup> 1945, No. 703/L.S., 11th June 1945.

<sup>9</sup> 1945, S.R. & O., No. 1006/L.18, 24th August, 1945.

*For the removal of doubt it is declared that 9th May, 1945, declared by the Tenancy Agreements (End of the War in Europe) Order, 1945, as the end of the war in Europe, is to be treated for the purposes of the construction of any tenancy agreement (with the above proviso), as the date of the signing of an armistice with each enemy state.*

## V. CONTINUANCE OF EMERGENCY POWERS

(See p. 46)

### 1. DEBATE IN HOUSE OF LORDS

On 6th March, 1945, the Marquess of Reading moved to resolve:—

“That such controls and regulations which affect the lives and businesses of persons in this country, instituted since September, 1939, for the purpose of assisting the prosecution of the war, be generally terminated as soon as military necessity no longer justifies the maintenance of any of them; and that such controls as are thereafter required for the re-establishment and stabilization of our post-war existence be enacted so as to provide for proper remedies at law to protect persons affected in their lives and businesses against arbitrary or obscure orders by executive departments or offices.”<sup>1</sup>

The noble Marquess pointed out that in 1943, 1,792 orders and regulations were issued; in 1944, 1,479, of which 238 only had been laid before Parliament.<sup>2</sup>

Lord Rennell declared that in a compendium of war rules and regulations there are “references to 10,000 orders and regulations, 220 Acts of Parliament and 300 leading cases.”<sup>3</sup>

### 2. CERTAIN DEFENCE REGULATIONS REVOKED

On 9th May, 1945—the day after the Prime Minister's Announcement of the unconditional surrender of Germany<sup>4</sup>—the Home Secretary announced that by Order in Council eighty-four defence regulations had been that day revoked entirely and twenty-five in part.<sup>5</sup>

### 3. SUPPLIES AND SERVICES (TRANSITIONAL POWERS) BILL, 1945

On 10th May, 1945, the Bill, presented by the Home Secretary and supported by the Attorney-General, was ordered to be printed.

By *clause 1*, if it appeared to His Majesty to be necessary or expedient that certain defence regulations<sup>6</sup> should have effect for the purpose of so maintaining, controlling and regulating supplies and services as—

(a) to secure at fair prices a sufficiency of those essential to the well-being of the community or their equitable distribution;

(b) to facilitate the readjustment of industry and commerce to the requirements of the community in time of peace;

(c) to assist in the relief of suffering and the restoration and distribution of essential supplies and services in any part of His Majesty's dominions or in foreign countries that are in grave distress as the result of war;

he may by Order in Council direct that the regulation—with such adaptations as appear necessary or expedient—shall have effect under this Act, whether or not it is necessary or expedient for its original purpose. Orders already in force under the regulation will continue in force as if they were made under the regulation as extended.

By *clause 2*, His Majesty, by Order in Council, might revoke or vary any defence regulation having effect under this Act.

<sup>1</sup> House of Lords, *Official Report* vol. 135 cols., 325–341, 418–444.

<sup>2</sup> *Ib.*, col. 329.

<sup>3</sup> *Ib.*, col. 428.

<sup>4</sup> *Supra*, p. 707.

<sup>5</sup> *Official Report*, vol. 410, cols. 1908–1912; 1945, S.R. & O., No. 504. See also No. 1208 (28th September), revoking further regulations; *Official Report*, 9th October, 1945, vol. 414, col. 112.

<sup>6</sup> Chiefly, those in Pt. III or Pt. IV of the Defence (General) Regulations, 1939.

By *clause 3*, every Order in Council under the principal Acts, containing *defence regulations*; every order or instrument made under defence regulations, which is determined to be a "*statutory rule*" (within the Rules Publication Act, 1893, s. 3), and to be "*of the nature of a public Act*" and was made after this Act was passed; and every Order in Council made under this Act; must be laid before Parliament "as soon as may be after it is made." Either House may, within forty days, resolve that it be annulled.

By *clause 4*, the operation of the principal Acts is unaffected. If they expire while this Act is in force, the provisions of those Acts (with certain exceptions) will, nevertheless, continue in operation for the purposes of this Act.

By *clause 5*, for the purposes of the Ministry of Supply Act, 1939 (which confers powers on the Minister to acquire, produce or dispose of articles required for the public service), "*articles required for the public service*" will include any supplies which the Minister considers it necessary or expedient to maintain, control or regulate for any of the purposes in clause 1 (1).

By *clause 7*, the Act will continue in force for two years from its passing and shall then expire. If, at any time while it is in force, an Address is presented to His Majesty by each House of Parliament praying that the Act should be continued for a further year from the time at which it would otherwise expire. His Majesty may, by Order in Council, direct that the Act continue for that further period.

The main function of the Bill was to impose new emergency powers for a period of two years in order to deal with the transition from war to peace, by regulating prices, facilitating the readjustment of industry and commerce and by assisting the relief of suffering and the restoration and distribution of essential supplies and services in any country that is in grave distress as a result of the war. Existing defence regulations would be adapted, or new ones would be made. Parliament would have control not only over regulations, but over orders and other instruments which, within forty days, could be annulled by prayer.

#### 4. EMERGENCY POWERS (DEFENCE) ACT, 1945

In view of the prospective dissolution of Parliament in June, 1945, the Bill was dropped, and on 31st May, 1945, the Home Secretary introduced the Emergency Powers (Defence) Bill to continue the existing Acts for six months.<sup>1</sup> No power exists to continue the Acts for less than one year.<sup>2</sup> It was not thought right to continue the Acts for the full year; hence—instead of the normal Address—the present Act. The present Parliament would not have the time to give to the issue the attention it deserved; it was for the new Parliament to review the whole position.<sup>3</sup>

The Attorney-General (Sir David Maxwell Fyfe), replying to the debate, declared that the courts have said that whether an Order in Council is "necessary or expedient" is a matter for the Minister of the Crown to decide: the courts will not interfere.<sup>4</sup> The Master of the Rolls had said: "We are here to administer justice: we are not here to run the affairs of the country. That is for His Majesty's Ministers." The courts will only interfere if the order is used in bad faith. The Emergency Powers Acts enable regulations to be made "for maintaining supplies and services essential for the life of the community": these clearly comprehended housing and furniture.<sup>5</sup>

The Bill was read a second time; considered in committee; reported, without amendment; read the third time, and passed—all at the same

<sup>1</sup> *Official Report*, vol. 411, cols 422-457.

<sup>2</sup> *Emergency Powers (Defence) Act*, 1939, s. 11 (1) as amended. *Supra*, 41.

<sup>3</sup> *Ib.* cols. 423, 424.

<sup>4</sup> *Ib.* col., 448.

<sup>5</sup> *Ib.*, col. 450.

sitting.<sup>1</sup> On 6th June, 1945, the Bill received a second reading and passed through the remaining stages in the House of Lords.<sup>2</sup>

On 24th February, 1946, the Acts will expire. The House will not be asked to continue them. An *Emergency Powers (Transitional Provisions) Bill* is to be introduced to keep alive for a limited period thereafter such residue of powers as will be necessary in the transitional period.<sup>3</sup>

##### 5. SUPPLIES AND SERVICES (TRANSITIONAL POWERS) BILL

A General Election having returned a Labour majority, on 9th October, 1945, the Bill was given a second reading without a division.

Clause 1—as in the previous draft—gives power to extend purposes of Defence Regulations.

Clause 2 is new. The power to make Defence Regulations will include power to make such regulations as appear to His Majesty to be necessary or expedient

“for controlling the prices to be charged for goods of any description or the charges to be made for services of any description.”

The Goods and Services (Price Control) Acts, 1943 to 1945, may be amended by Defence Regulation.

By Clause 3. Defence Regulations under this Act may be *revoked or varied*.

Clause 4—the old clause 3—imposes *Parliamentary control* over Defence Regulations and orders and other instruments made under Defence Regulations.

Clause 5—the old clause 4—deals with the operation of the principal Acts. If they expire while this Act is in force, *their provisions (with exceptions), will, nevertheless, continue in operation for the purposes of this Act.*

“War period” in the Requisitioned Land and War Works Act, 1945, includes any period after the principal Act expires during which this Act is in force.

Clause 6 (previously clause 5), relates to the powers of the Minister of Supply.

By clause 8, the Act will continue in force for *five years*. It may be contained by *Address*, from year to year.

In two respects the present Bill goes further than the previous draft:—

(a) the power to control *prices for any goods and charges for any services* and to control prices for *particular products and businesses*;

(b) the duration of the Act for *five years*.

For the *Debate*, see *Official Report*, 9th October, 1945, vol. 414, cols. 111–180.

#### VI. ENEMY CHARACTER

(See Chap. III, *supra*, p. 89)

##### 1. “SPECIFIED PERSONS.” (See *supra*, p. 92)

The orders extant on 31st July, 1945, are as follows:—

Trading with the Enemy (Specified Persons) (Amendment) (No. 8) Order, 1945<sup>4</sup>—a revoking and consolidating order; and (No. 9) Order.<sup>5</sup>

##### 2. “ENEMY TERRITORY.” (See *supra*, p. 97)

###### (a) *France*

See Trading with the Enemy (Authorisation) (France and Monaco) Order, 1945<sup>6</sup>;

<sup>1</sup> *Ib.*, col. 456.

<sup>2</sup> *House of Lords, Official Report*, vol. 136, cols. 406–419.

<sup>3</sup> *House of Commons, Official Report*, 9th October, 1945, vol. 414, col. 115.

<sup>4</sup> S.R. & O., 1945, No. 830.

<sup>5</sup> S.R. & O., 1945, No. 936.

<sup>6</sup> 28th March, 1945: S.R. & O., 1945, No. 346.

Trading with the Enemy (Transfer of Negotiable Instruments, etc.) (France and Monaco) Order, 1945<sup>1</sup>;  
 Trading with the Enemy (Custodian) (Amendment) (France and Monaco) Order, 1945.<sup>2</sup>

These orders remove the obstacles in the way of trading with persons in France, which arose out of the Trading with the Enemy legislation. And see *The Anglo-French Financial Agreement*, Cmd. 6613.

(b) *Channel Islands*

By Trading with the Enemy (Enemy Territory Cessation) (Channel Islands) Order, 1945, the Channel Islands, as from 25th May, 1945, ceased to be treated as if they were enemy territory for the purposes of Trading with the Enemy Act, 1939, ss. 3A, 4, 5 and 7.<sup>3</sup>

(c) *Belgium*

The Trading with the Enemy (Authorisation) (Belgium and Luxembourg) Order, 1945, revokes and re-enacts S.R. & O., 1945, No. 91, and extend its provisions to Luxembourg.<sup>4</sup>

(d) *Finland*

The Trading with the Enemy (Authorisation) (Finland) Order, 1945, permits trade within limits with the Finnish State and with individuals and persons in Finland.<sup>5</sup>

## VII. LIMITATION (ENEMIES AND WAR PRISONERS) ACT, 1945

(See p. 185)

The Committee on *Limitation of Actions and Bills of Exchange*, in the absence of judicial interpretation of "the very precise words" of the Limitation Act, 1939, recommended *express statutory provision to suspend the statutory period of limitation* while a party to an action continued to be an enemy or continued to be detained in enemy territory as a prisoner of war or civilian internee and for twelve months after ceasing to be an enemy or to be so detained, or after the passing of the Act, whatever be the later date.<sup>6</sup> They annexed a set of draft clauses.<sup>7</sup>

On 23rd January, 1945, in the House of Lords, Viscount Simon, L.C., proposed the Second Reading of the Limitation (Enemies and War Prisoners) Bill, which closely followed the Draft Clauses.<sup>8</sup> The Bill was necessary *first*, because the war was prolonged, and *secondly*, because of the wide areas of Europe and Asia occupied by the enemy. Norwegians in Oslo, Dutchmen at the Hague, British subjects in Singapore were treated as "enemies": otherwise, the fruit of their action in the courts (were they permitted to sue as *plaintiffs*) would enure to the advantage of Germany or Japan. Thus, these men, through lapse of time, would be in danger of losing their rights of action.<sup>9</sup> Again, a good right of action *against* an enemy, through inability to serve or lack of evidence, might fail because of lapse of time.<sup>10</sup>

After the last war, the matter was dealt with in the Treaty of Versailles, followed by an order under the Treaty of Peace Act. The object of the Bill was to suspend in these cases, the running of time—"to have blotted out from it" (*sc.* the limitation period), "the period during which it was impracticable or illegal to sue."<sup>11</sup>

Moving the Second Reading in the House of Commons, on 9th February, 1945, the Attorney-General (Sir Donald Somervell, K.C.) said that where two parties are "enemies," the period of limitation

<sup>1</sup> 29th March, 1945: S.R. & O., 1945, No. 347. <sup>2</sup> 29th March, 1945: S.R. & O., 1945, No. 348

<sup>3</sup> 25th May, 1945: S.R. & O., 1945, No. 545. <sup>4</sup> S.R. & O., 1945, No. 858, 19th July, 1945.

<sup>5</sup> S.R. & O., 1945, No. 1030, 20th August, 1945.

<sup>6</sup> (1945), Cmd. 6591, paras. 7, 12, 15, 19, 20, 27 (1); *supra*, 185.

<sup>7</sup> *Appendix*.

<sup>8</sup> House of Lords, *Official Report*, vol. 134, cols. 630-633.

<sup>9</sup> *Ib.*, col. 631; Cmd. 6591, para. 10. See *Solicitors' Journal*, 21st April, 1945, p. 182.

<sup>10</sup> *Ib.*, col. 632.

<sup>11</sup> *Ib.*, col. 633.

should be suspended because "both in law and in fact they cannot really get at each other or communicate."<sup>1</sup> Whether the court, under the ordinary law, would decide that enemy status suspended the period was "doubtful"; it was desirable that there should be no doubt. The problem was being dealt with by a Bill instead of being left for a Treaty of Peace; our relationship with "technical enemies" in Europe or the Far East would not be covered in any Treaty of Peace.<sup>2</sup>

**SECTION 1.—*Suspension of limitation period where party was an enemy or detained in enemy territory***

***Subsection (1).—The New Rule***

"If at any time before the expiration of the period prescribed by any statute of limitation for the bringing of any action any person who would have been a necessary party to that action if it had then been brought was an enemy or was detained in enemy territory, the said period shall be deemed not to have run while the said person was an enemy or was so detained, and shall in no case expire before the end of twelve months from the date when he ceased to be an enemy or to be so detained, or from the date of the passing of this Act, whichever is the later :

Provided that, where any person was only an enemy as respects a business carried on in enemy territory, this section shall only apply, so far as that person is concerned, to actions arising in the course of that business."

**Notes**

(a) Persons "*detained in enemy territory*," e.g., prisoners of war or civilian internees, who do not fall within the category of "enemy."<sup>3</sup>

(b) *Twelve months after enemy character lost, or passing of the Act (28th March, 1945), whichever is the later.*

The committee pointed out that merely to suspend the statutes for the period during which one of the parties was an enemy might not suitably solve every case: (i) the limitation period may be a *short* one; (ii) only a *short part of the period might have remained* when enemy character was acquired; (iii) enemy character has been lost and the *balance of the limitation period has wholly or nearly run out* before the date of the Act. Hence the committee recommended that the limitation period should not expire until *twelve months after* enemy character was lost or the passing of the Act, whichever be the later (Cmd. 6591, para. 20).

In certain cases where the limitation period is *less than twelve months*,† a longer period of limitation will thus ensue than if no party ever had enemy character.

(c) *The Proviso.* This deals with a case where a business was partly in enemy territory and partly in neutral territory.‡

\* *Vandyke v. Adams* [1942] Ch 155, 157, per Farwell, J; Domke 118, 119; *supra*, 167. Cmd. 6591, paras. 8 (c), 21: "the disability is not a legal disability but a factual disability arising from difficulty of communication in fact."

† For example, under Law Reform (Miscellaneous Provisions) Act, 1934, s. 1 (3) (b).

‡ See Trading with Enemy Act, 1939, s. 2 (1) (e), *supra*, 92.

***Subsection (2)—Test, for this Act, of Enemy Status***

"If it is proved in any action that any person was resident or carried on business or was detained in enemy territory at any time, he shall for the purposes of this Act be presumed to have continued to be resident or to carry on business or to be detained, as the case may be, in that territory until it ceased to be enemy territory, unless it is proved that he ceased to be resident or to carry on business or to be detained in that territory at an earlier date."

\* House of Commons, *Official Report*, vol. 407, cols. 2393-2404, at col. 2393.

\* *Id.*, col. 2399; Cmd. 6591, para. 10, 11.

### Note

Although there will be *one date*—the committee point out—upon which a particular area or territory ceases to have enemy character, yet a party may have retained enemy character for a *short time only*; he may have escaped from enemy territory, or an enemy company may have changed its “domicile.” Again, a party may have been associated with *several enemy areas or territories* which may lose enemy character at *different dates*. Since the principle was *legal disability*, the period of suspension (*subject to the twelve months’ extension*) should logically *co-extend with the period of a party’s enemy character*, rather than with the period during which a territory was treated as enemy territory.\*

### Subsection (3).—Aggregation of Periods

“If two or more periods have occurred in which any person who would have been such a necessary party as aforesaid was an enemy or was detained in enemy territory, those periods shall be treated for the purposes of this Act as one continuous such period beginning with the beginning of the first period and ending with the end of the last period.”

### Note

A Frenchman may have made occasional visits to Portugal: they will be treated as a continuous period.†

\* Cmd. 6591, paras. 15, 16.

† Example given by the Attorney-General. *Official Report* vol 407, col 2400

## SECTION 2.—Interpretation

### Subsection (1).—Meaning of Terms

“‘Action’ means civil proceedings before any court or tribunal and includes arbitration proceedings:

“‘Enemy’ means any person who is, or is deemed to be, an enemy for any of the purposes of the Trading with the Enemy Act, 1939, except that in ascertaining whether a person is such an enemy the expression ‘enemy territory’ in section two of the said Act shall have the meaning assigned to that expression by this section:

“‘Enemy territory’ means:—

- (a) any area which is enemy territory as defined by subsection (1) of section fifteen of the Trading with the Enemy Act, 1939;
- (b) any area in relation to which the provisions of the said Act apply, by virtue of an order made under subsection (1A) of the said section fifteen, as they apply in relation to enemy territory as so defined; and
- (c) any area which, by virtue of Regulation six or Regulation seven of the Defence (Trading with the Enemy) Regulations, 1940, or any order made thereunder, is treated for any of the purposes of the said Act as enemy territory as so defined or such territory as is referred to in the last foregoing paragraph:

“‘Statute of limitation’ means any of the following enactments, that is to say—

- the Limitation Act, 1939,
- section three of the Fatal Accidents Act, 1846,
- section four of the Employers’ Liability Act, 1880,
- section ten of the Copyright Act, 1911,
- section eight of the Maritime Conventions Act, 1911,
- Rule 6 of Article III of the Schedule to the Carriage of Goods by Sea Act, 1924,
- subsection (1) of section thirteen of the Moneylenders Act, 1927,
- Article 29 of the First Schedule to the Carriage by Air Act, 1932,

section one of the Law Reform (Miscellaneous Provisions) Act, 1934,  
 subsection (1) of section seven of the Matrimonial Causes Act, 1937."

### Notes

*Enemy.* The Act relates to "statutory enemies"—a term which includes, but is wider than, "enemies at common law."\* It includes persons on the "Black List."

*Enemy Territory.* For (a) and (b), see *supra*, 97, note 6.

\* Regulation 7 of the Defence (Trading with the Enemy) Regulations, 1940, provides that territory which, on 28th September, 1944, was, under enemy sovereignty, should be treated, for all purposes of the Act, as enemy territory. The Board of Trade may direct that, from a specified day, for all, or for any of, the statutory purposes, any area shall be treated as not being enemy territory. Thus, until released by the Board of Trade, Germany remains enemy territory.†

Regulation 6 applies ss. 3A, 4, 5 and 7 of the Trading with the Enemy Act, 1939, to liberated territories until the Board of Trade by order specify.‡

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\* Cmd. 6591, para. 8; *supra*, 91, 92

† Cmd. 6591, para. 17

‡ *Ib.*

### Subsection (2).—Persons who would have been Necessary Parties

"References in this Act to any person who would have been a necessary party to an action shall be construed as including references to any person who would have been such a necessary party but for the provisions of section seven of the Trading with the Enemy Act, 1939, or any order made thereunder."

### Note

Section 7 of the Trading with the Enemy Act relates to the office of, and the functions of the *Custodian of Enemy Property*.\*

The Custodian has, or may have had, a statutory transfer of all or some of an enemy's rights.†

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\* *Supra*, 219, 220. For effect of *Custodian Orders*, see *supra*, 220–224.

† See *Solicitors' Journal*, 21st April, 1945, p. 183.

### Subsection (3).—Prisoners of War and Civilian Internees

"References in this Act to the period during which any person was detained in enemy territory shall be construed as including references to any period immediately following the period of such detention during which that person remained in enemy territory."

### Note

This refers to "any period during which they involuntarily remained in enemy territory after escape from confinement or pending repatriation."\* During this period they are not technically "detained," but until they leave enemy territory they will have the advantage of this Act.†

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\* Cmd. 6591, para. 21.

† House of Commons, *Official Report*, vol. 407, col. 2401.

### Subsection (4).—Certificate of Secretary of State

"Subsection (2) of section fifteen of the Trading with the Enemy Act, 1939 (which provides that a certificate of a Secretary of State shall, for the purposes of proceedings under or arising out of that Act, be conclusive evidence of certain matters affecting the definition of 'enemy territory'), shall apply for the purposes of any action to which this Act relates."



### Note

The intention of the Government is to issue a document from time to time showing the dates upon which territories became, and the dates upon which they ceased to be, enemy territory.\*

\* House of Commons, *Official Report* vol. 407, col. 2404. See Appendix VIII, *infra*.

#### *Subsection (5).—Enactment or Regulation includes Amendment*

"References in this Act to any enactment or to any Defence Regulation shall be construed as referring to that enactment or Regulation as amended by any subsequent enactment or Defence Regulation."

#### *SECTION 3.—Application to the Crown*

"This Act shall apply to proceedings to which the Crown is a party, including proceedings to which His Majesty is a party in right of the Duchy of Lancaster and proceedings in respect of property belonging to the Duchy of Cornwall."

#### *SECTION 4.—Application to Scotland*

"In the application of this Act to Scotland—

(a) for subsection (1) of section one the following subsection shall be substituted:—

'(1) If, during any period of less than ten years prescribed by any of the enactments hereinafter referred to as the period within which any action or diligence must be raised or executed or on the expiry of which any limitation on the mode of proof in any action becomes operative or any obligation is extinguished, any person who would have been a necessary party to such action or who was a party to such obligation was an enemy or was detained in enemy territory, the period so prescribed shall be deemed not to have run while the said person was an enemy or was so detained, and shall in no case expire before the end of twelve months from the date when he ceased to be an enemy or to be so detained or from the date of the passing of this Act whichever is the later :

Provided that where any person was only an enemy as respects a business carried on in enemy territory, this section shall only apply so far as that person is concerned to actions or obligations arising in the course of that business.

The enactments hereinbefore referred to are—

the Act of the Parliament of Scotland, 1579, cap. 21,  
the Act of the Parliament of Scotland, 1669, cap. 14,  
the Act of the Parliament of Scotland, 1695, cap. 7,  
section thirty-seven of the Bills of Exchange (Scotland)  
Act, 1772,

section four of the Employers' Liability Act, 1880,  
section one of the Public Authorities Protection Act,  
1893,

section ten of the Copyright Act, 1911,

Rule 6 of Article III of the Schedule to the Carriage of  
Goods by Sea Act, 1924,

subsection (1) of section thirteen of the Moneylenders  
Act, 1927,

Article 29 of the First Schedule to the Carriage by Air  
Act, 1932 ;'

(b) in subsection (3) of section one after the words 'necessary party' there shall be inserted the words 'or was a party to such obligation.'"

SECTION 5.—*Application to Northern Ireland*

"In the application of this Act to Northern Ireland, the expression 'statute of limitation' means any enactment (whether of the Irish Parliament or of the Parliament of the United Kingdom or of the Parliament of Northern Ireland) in force in Northern Ireland at the date of the passing of this Act under which a period is prescribed as the period within which any action to which such enactment relates is required to be brought, but does not include any enactment prescribing a period within which any criminal proceedings, or any proceedings to recover any penalty imposed as a punishment for a criminal offence, or any proceedings before a court of summary jurisdiction must be brought."

SECTION 6.—*Short Title and Date of Operation**Subsection (1).—Title*

"This Act may be cited as the Limitation (Enemies and War Prisoners) Act, 1945."

*Subsection (2).—Date of Operation*

"This Act shall be deemed to have had effect as from the third day of September, nineteen hundred and thirty-nine."

**VIII. LIST OF DATES ON WHICH TERRITORIES BECAME,  
AND CEASED TO BE, "ENEMY TERRITORIES" AS DEFINED  
BY s. 2 OF THE ABOVE ACT**

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TERRITORY	DATE OF COMMENCEMENT AS ENEMY TERRITORY
Germany (including Austria and Memel)	3rd September, 1939.
Danzig	8th September, 1939.
Protectorate of Bohemia and Moravia, and Slovakia	8th September, 1939.
Poland—the region of Suwalki and areas west of a line Koln—Lomza—Ostrolenka—Malkin—River Bug (up to the South of Sokal) thence north of a line Rawa Ruska—Jaroslav, thence west of the River San to its source	1st January, 1940.
Denmark (excluding Greenland and the Faroe Islands)	12th April, 1940.
Norway (except Nordland, Troms, Finnmark and Sval- bard (Spitzbergen))	20th May, 1940.
The Netherlands	20th May, 1940.
Luxembourg	20th May, 1940.
Belgium	31st May, 1940.
Italy and Albania	11th June, 1940.
Italian Colonies (including Italian Somaliland and Eritrea)	11th June, 1940.
Ethiopia	11th June, 1940.
France (occupied zone according to the provisions of the Franco-German Armistice Convention of the 22nd June, 1940)	24th June, 1940.
Channel Islands	1st July, 1940.
The Norwegian Provinces of Nordland, Troms and Finnmark	10th July, 1940.
<sup>1</sup> France (unoccupied zone, including Corsica and Algeria), French Zone of Morocco, Tunisia	10th July, 1940.
<sup>2</sup> Monaco	13th August, 1940.
<sup>3</sup> French Somaliland	4th September, 1940.

<sup>1</sup> Unoccupied France, Corsica, Algeria, French Morocco and Tunisia were specified by 1940 S.R. & O. 1219.

<sup>2</sup> Monaco by 1940 S.R. & O. 1476.

<sup>3</sup> French Somaliland by 1940 S.R. & O. 1625.

TERRITORY	DATE OF COMMENCEMENT AS ENEMY TERRITORY
¹Roumania .. .. .	15th February, 1941.
²Bulgaria .. .. .	5th March, 1941.
³Hungary .. .. .	8th April, 1941.
Ruthenia and adjacent territory in Slovakia (incorporated in Hungary before the outbreak of the German War)	8th April, 1941.
⁴Yugoslavia .. .. .	18th April, 1941.
⁵The mainland of Greece .. .. .	30th April, 1941.
⁶Syria and the Lebanon .. .. .	27th May, 1941.
Crete .. .. .	1st June, 1941.
Lithuania .. .. .	29th June, 1941.
Latvia .. .. .	4th July, 1941.
Poland, east of the region of Suwalki, and of the line Kolno Lonza—Ostrolenka—Malkin—River Bug up to the South of Sokal, thence south of the line Rawa Ruska—Jaroslavl, thence east of the River San to its source	19th July, 1941.
Bukovina and Bessarabia .. .. .	20th July, 1941.
⁷Finland .. .. .	2nd August, 1941.
Estonia .. .. .	28th October, 1941.
Japan (including Karafuto and Japanese Empire and Japanese Mandated Islands)	8th December, 1941.
Japanese-occupied China, including Manchuria, the whole coast of China and the International Settlement and the French Concession at Shanghai, but excluding Macao	8th December, 1941.
French Indo-China .. .. .	8th December, 1941.
Guam .. .. .	10th December, 1941.
Siam .. .. .	12th December, 1941.
Hong Kong .. .. .	25th December, 1941.
Straits Settlement; i.e., Singapore, Malacca, Penang (including Province Wellesley and Labuan; the Federated Malay States of Perak, Negri Sembilan, Selangor and Pahang, the Unfederated Malay States of Johore, Kedah, Perlis, Kelantan, Trengganu and Brunei; the States of North Borneo and Sarawak) excluding the Cocos-Keeling Islands	15th February, 1942.
Netherlands East Indies .. .. .	7th March, 1942.
Portuguese Timor .. .. .	7th March, 1942.
Andaman and Nicobar Islands .. .. .	23rd March, 1942.
Philippines .. .. .	9th May, 1942.
Japanese-occupied Burma .. .. .	20th May, 1942.
Changsha (China) and dependent areas .. .. .	18th June, 1944.
Foochow (China) and dependent areas .. .. .	4th October, 1944.
Kweilin (China) and dependent areas .. .. .	19th November, 1944.

¹ Roumania by 1941 S.R. &amp; O. 189.

² Bulgaria by 1941 S.R. &amp; O. 290.

³ Hungary by 1941 S.R. &amp; O. 495.

⁴ Yugoslavia by 1941 S.R. &amp; O. 543.

⁵ Mainland of Greece by 1941 S.R. &amp; O.'s 598 and 613.

⁶ Syria and the Lebanon by 1941 S.R. &amp; O. 731.

⁷ Finland by 1941 S.R. &amp; O. 1117

## TERRITORIES WHICH HAVE CEASED TO BE ENEMY TERRITORIES

TERRITORY	DATE OF CESSATION AS ENEMY TERRITORY
<sup>1</sup> Corsica, Syria and the Lebanon, French Somaliland, Algeria, the French Zone of Morocco, and Tunisia	9th December, 1943.
<sup>2</sup> Cyrenaica, Tripolitania, and the territories formerly known as Italian East Africa	20th December, 1944.
Channel Islands .. .. .	25th May, 1945.

<sup>1</sup> Specified by 1943 S.R. & O. 1684.

<sup>2</sup> Specified by 1944 S.R. & O. 1416.

## NOTES

I. The dates of commencement as enemy territory which are shown in the above list may be taken with the exception of those territories in respect of which an S.R. & O. reference is noted, as the dates on which substantially the whole of the areas described became enemy territory; parts of the areas became, or may have become, enemy territory on earlier dates. Where, in these cases, it is material for the purposes of any proceedings to which the Limitation (Enemies and War Prisoners) Act, 1945, relates to ascertain the exact date when any particular area became enemy territory, this may be done by application to the Under-Secretary of State for Foreign Affairs.

II. Parts of the Union of Soviet Socialist Republics, and certain islands in the Pacific have from time to time been occupied by the enemy, but no general date is available for these areas.

III. The above list has been prepared by the Lord Chancellor in consultation with the Foreign Office, the Board of Trade and the Trading with the Enemy Department.

## IX. TRADING WITH THE ENEMY

(See Chap. V, *supra*, p. 186)

1. DEFENCE (TRADING WITH THE ENEMY) REGULATIONS, 1940 :  
NEW REG. 4. PARA (3A)<sup>1</sup>

On 9th May, para. (3A) was added to reg. 4.

By para. (3) the Treasury may direct payment or transfer to specified persons, of money or property owing its enemy character to its connection with territory which is not under the sovereignty of a power with which His Majesty is at war.

By the new para. (3A), a Custodian shall, if the Treasury so directs, pay or transfer such money or property to a specified person who appears to the Treasury to exercise the functions of custodian in a Dominion or other territory to which the Act may be extended (i.e., a colony, protectorate, protected state, or mandated territory), or in the territory of an allied Power or of a Power at war with any Power with whom His Majesty is at war.

2. DEFENCE (TRADING WITH THE ENEMY) REGULATIONS, 1940 :  
NEW REG. 4A<sup>2</sup>

Where, under the Act, the right to transfer securities has been vested in a Custodian, on the ground that they belonged to, or were held or managed on behalf of—

<sup>1</sup> S.R. & O., 1945, No. 501.

<sup>2</sup> S.R. & O., 1945, No. 787. "Securities" means annuities, stock, shares, bonds, debentures or debenture stock (para. (4)).

(a) an individual *resident in enemy territory* not under the sovereignty of a power with whom His Majesty is at war, or in any area to which the Act applies,

(b) an individual or body of persons *carrying on business* in such territory or area,

(c) any body of persons carrying on business anywhere, *controlled by an individual or body of persons mentioned in (a) or (b), and the securities have been transferred*, the Board of Trade may by order direct that this regulation should apply to the securities.

The Board must *forthwith give notice of such order to the company or other body in whose book the securities are registered or inscribed, and thereupon—*

(a) the securities will *automatically re-vest* in the person who (but for the vesting in the custodian of the right to transfer), would have been entitled to them,

(b) the company or other body will *cause the securities to be registered or inscribed* in the name of the person in whose name they were registered or inscribed before the Custodian transferred them,

(c) where the *person mentioned in (b) is not the same as the person in whom this Regulation vests the securities and before they have been registered or inscribed under (b), the person in whom they are so vested proves his title to the company's satisfaction, the company may register or inscribe them in his name.*

### 3. TRANSFER OF NEGOTIABLE INSTRUMENTS. (See *supra*, p. 203)

See :—

(i) The Trading with the Enemy (Transfer of Negotiable Instruments, etc.) (Belgium and Luxembourg) Order, 1945.<sup>1</sup>

This Order (revoking S.R. & O., 1945, No. 92), sanctions transfers made by or on behalf of persons to whom the order applies.

(ii) The Trading with the Enemy (Transfer of Negotiable Instruments, etc.) (Denmark) Order, 1945.<sup>2</sup>

(iii) The Trading with the Enemy (Transfer of Negotiable Instruments, etc.) (Finland) Order, 1945.<sup>3</sup>

### 4. TRADING WITH THE ENEMY (CUSTODIAN) (AMENDMENT) (INSURANCE) NO. 2 ORDER, 1945.<sup>4</sup> (See *supra*, p. 221)

Article 1 of the Custodian Order (requiring payment of certain moneys by the Custodian) will *not apply to any money which, but for war, would have become payable to or for the benefit of any person within art. 2 of this Order under or in respect of a contract of insurance or re-insurance.*

The order applies—

(a) to an individual *resident in territory* not being an area under the sovereignty or in the occupation of a Power with which His Majesty is at war,

(b) as respects *any business carried on in such territory*, to any individual or body of persons carrying on that business,

(c) as respects any business carried on in territory which is *neither enemy territory nor an area to be treated as enemy territory for the purpose of s. 7 of the Act (under reg. 6 or reg. 7 of the Defence (Trading with the Enemy) Regulations, 1940),<sup>5</sup> to any body of persons carrying on that business if and so long as controlled by an individual resident in, or by a body of persons carrying on business in, a territory referred to in (a).*

<sup>1</sup> S.R. & O., 1945, No. 859, 19th July, 1945.

<sup>2</sup> S.R. & O., 1945, No. 961, 20th August, 1945.

<sup>3</sup> S.R. & O., 1945, No. 1031, 20th August, 1945

<sup>4</sup> 9th June, 1945 : S.R. & O., 1945, No. 850.

<sup>5</sup> S.R. & O. 1940, No. 1092 ; 1941, No. 51 ; 1942 No. 306 ; 1943, No. 1034 ; 1944, No. 1123.

## 5. THE TRADING WITH THE ENEMY (CUSTODIAN) (NO. 2) ORDER, 1945<sup>1</sup>

By art. 1 there shall vest in the Custodian—

(i) any debt which, but for the war, would be payable to or for the benefit of an "enemy" as defined in art. 2;

(ii) in respect of any moneys which, but for the war, would be payable to or for an "enemy," all his right, title or interest.

But the debt or right will not so vest if the vesting would cause the debt or right to be forfeited or determined.

By art. 2 "enemy" is confined to—

(a) a State or sovereign of a State at war with His Majesty;

(b) any individual resident in any area under the sovereignty of a Power with whom His Majesty is at war, not being occupied by His Majesty or an allied Power before 10th July, 1943;

(c) a body incorporated under the laws of a State at war with His Majesty;

(d) a body (corporate or unincorporate) carrying on business anywhere, if controlled by a person or body within (a), (b) or (c);

(e) as respects any business carried on in such area, any individual or body (corporate or unincorporate) carrying on business in that territory.

## 6. MISCELLANEOUS

See also—

The Trading with the Enemy (Custodian) (Amendment) (Belgium and Luxembourg) Order, 1945.<sup>2</sup>

The Trading with the Enemy (Custodian) (Amendment) (Finland) Order, 1945.<sup>3</sup>

## X. RECENT INSURANCE CASES

(See Chap. XIII. *supra*, p. 295)

### 1. RESTRAINT OF PRINCES. (See *supra*, p. 324)

In *Bater Castor Oil Company v. Insurance Company of North America*,<sup>4</sup> a District Court of New York defined "restraint of princes" as—

"The operation of the sovereign power by an exercise of *vis major*, in its sovereign capacity, controlling and divesting for the time the dominion or authority of the owner over the ship . . . and in marine and war risk policies restraint of princes applies only to acts done in the exercise of the sovereign power."<sup>5</sup>

The company had insured cargo shipped in Brazilian vessels and carried from ports in Brazil to ports in the United States; New York was nominated as the port of discharge. The vessels were owned and operated by the Brazilian Government through a department called *Lloyd Brasileiro* for the purpose of carrying privately owned cargoes in foreign trade for profit. In 1941, before the United States entered the war, the *L.B.* applied to the United States Maritime Commission for "warrants" entitling them to certain priorities. Warrants were issued provided that the shipowners agreed to abide by the regulations of the Maritime Commission (later, the War Shipping Administration), including routes and voyages. Several Brazilian vessels having been sunk, the *L.B.* in March, 1942, ordered all its vessels in port to remain in port, and all vessels at sea to put into the nearest Brazilian port. In April, 1942, the *L.B.* applied to the Insurance Committee of the United States War Shipping Administrators for full war risk insurance on six specified vessels, four destined for New York and two for New Orleans. The applications were granted provided that all the vessels,

<sup>1</sup> S.E. & O., 1945, No. 887

<sup>2</sup> S.E. & O., 1945, No. 860, revoking No. 93.

<sup>3</sup> S.E. & O., 1945, No. 1032.

<sup>4</sup> (1945), 75 Ll. L. Rep. 240.

<sup>5</sup> *Ib.*, at 242 citing *Brodie v. Maryland Insurance Co.*, 37 U.S. 378 397, 398; *Northern Pacific Railway Co. v. American Trading Co.*, 195 U.S. 439 467. *The Clarendon* 264 Fed. 276, 281.

for safety, proceeded to New Orleans. The *L.B.* accordingly ordered its vessels to proceed to New Orleans and insurance was issued. Cargoes were discharged at New Orleans and the company procured and paid for carriage by rail to their factory in Bayonne, New Jersey.

They now claimed freight charges for transportation by railroad of cargo discharged from their Brazilian vessels. They were insured under two open policies: one against marine risks covering the cargo from shippers' warehouse in Brazil to the defendants' warehouse in Bayonne; the other insured against war risks, which gave cover while cargo was aboard overseas vessels from ports of loading in Brazil to ports of discharge in the United States.

The claim failed. The evidence failed to establish that the Brazilian Government, in the exercise of its sovereign power, ordered the vessels as to their ports of destination. The *L.B.* gave the orders. The United States Government could not and did not attempt to exercise sovereign rights over Brazilian vessels in Brazilian ports.<sup>1</sup>

## 2. WAR RISKS AND PERILS OF THE SEA. (See *supra*, p. 339)

(a) In *Link and Others v. General Insurance Company of America*,<sup>2</sup> a collision occurred between *The Eastern Prince*, a motor vessel, and *The Rustabout*, a U.S. Navy tanker, proceeding with oil for the armed forces from one war base to another. The Washington Court held that the damage was a consequence of "warlike operations."

The court cited *Queen Insurance Company v. Globe Insurance Company*,<sup>3</sup> in which Holmes, J., held that American courts should look only to the cause nearest the injury; he approved, however, the ruling of the lower Federal Courts that English decisions should be followed by American courts. There, a collision occurred during war between two merchant vessels in separate convoys proceeding, with screened lights under naval command, in opposite directions. The collision resulted from the unexpected head-on meeting of the two convoys. One of the vessels carrying munitions was sunk. The court held that the loss was not a consequence of warlike operations.

In *The Link Case* the court said that two principles are to be considered. First, we "generally are to stop our inquiries with the cause nearest to the loss." Secondly, "for expediency and harmony in the marine insurance world the American courts should follow the English court decision."<sup>4</sup>

"... the requirement to follow English court decisions is a more specific and less variable criterion than that of stopping at the cause nearest to the loss, because if there is an authoritative English decision on the facts of the case in question that decision concludes the matter, whereas stopping at the cause nearest to the loss may and assuredly does reasonably involve the further debatable question of what is or what is not meant by the nearest cause of loss."<sup>5</sup>

(b) In *The Braconbush*,<sup>6</sup> Atkinson, J., held, that on a balance of probabilities the plaintiffs had discharged the onus of proving that the ship was holed through contact with an explosive float, and that they were entitled to recover from the war risk insurers.

A small steam trawler, twenty-two years old, which had been overhauled in 1941, was holed below the water line, and sank in deep water off the Scottish coast in January, 1942, while she was being taken in tow by

<sup>1</sup> *Ib.*, at 243.

<sup>2</sup> (1944), 77 Ll. L. Rep. 431. United States.

<sup>3</sup> (1923), 203 U.S. 487. See *Aetna Insurance Company v. United Fruit Company*, 304 U.S. 430.

<sup>4</sup> (1944), 77 Ll. L. Rep., at 432.

<sup>5</sup> *Ib.*, at 432. See *supra*, 332, 335. See, also, Lord Porter's summary in *The Cornwall* [1942] A.C. 601, 715, 716; *supra*, 346.

<sup>6</sup> *United Scottish Insurance Co., Ltd. v. British Fishing Vessels Mutual War Risk Association, Ltd.* (1945), 78 Ll. L. Rep. 70.

another trawler. A dispute arose between the marine risks, and the war risks insurers whether the cause was an external explosion or the striking of submerged wreckage. There was evidence of an explosion alongside the ship and of the presence in the vicinity of explosive floats which had broken adrift from German minefields. On the *balance of probabilities* an explosive float was the cause of the loss; the theory of submerged wreckage was no more than a possibility, not borne out by the evidence.

The plaintiffs, said Atkinson, J., were not called upon to prove *beyond all doubt* that the ship was lost through a war risk: "they are not called upon to exclude every bare possibility of other causes, but they have to establish a probability so great as to carry conviction to the mind of a reasonable man."<sup>1</sup> After a careful investigation, he was satisfied that "in all human probability" contact with an explosive float was the cause of the loss. The only alternative was "a mere possibility on which there is not a particle of worthwhile evidence."<sup>2</sup>

(c) In *Athel Line, Ltd. v. Liverpool & London War Risks Insurance Association, Ltd.*,<sup>3</sup> the Athel Line had insured *The Atheltemplar*, a motor ship belonging to the W. R. Association, against the consequences of warlike operations. The ship (under requisition under the T99A (tankers) form of charter party), having brought fuel oil from Trinidad in October, 1940, to naval bases in Scotland, was ordered to discharge part at Lochalsh and to take the remainder to Scapa Flow. Arrived at Lochalsh, and *while lying at anchor*, she grounded and was damaged. The Athel Line refused to pay a claim under the policy, saying that at the time of the casualty, the ship was not engaged on a warlike operation, and that if she were, the stranding was not the consequence of any warlike operation.

The matter came before an arbitrator on an agreed statement of facts. He found, subject to the opinion of the court, that the ship was engaged on a warlike operation and that the damage by grounding was the consequence of a warlike operation.

Damage from sea peril, said Atkinson, J., while the ship is engaged on a warlike operation, is on a different footing from damage while the ship is not so engaged, although the peril and the damage are precisely the same.<sup>4</sup> When the accident happened the warlike operation had not been completed. If this ship had been a war vessel, she was still engaged on a warlike operation; under the reasoning in *The Corwold*,<sup>5</sup> she was to be treated as if she were a war vessel. "The warlike operation took the vessel to an unknown destination. Lochalsh is not a port, nor was this an approach to a port. This was an open loch which was being temporarily used as a naval base for warships."<sup>6</sup>

Atkinson, J., proceeds:—

"Would not any ordinary man in the street, looking at the matter broadly, say that the accident in this case was caused by the ship's being directed to anchor in a place where there was a hidden danger, and that the stranding was the consequence of the warlike operation on which she was engaged? It was all part and parcel of it."

### 3. CONSTRUCTIVE TOTAL LOSS (see *supra*, p. 350)

In *Court Line, Ltd. v. R.*<sup>7</sup> the suppliants owned a requisitioned motor ship, the *Lavington Court*, built in 1940. Under a time charter-

<sup>1</sup> *Ib.*, at 75. He cited from the judgments of Bankes, Scrutton and Atkin, L.J.J., in *Munro Brice & Co. v. Martin*, 36 T.L.R. 241, 242, 243.

<sup>2</sup> 78 Ll. L. Rep., at 82.

<sup>3</sup> (1945), 61 T.L.R. 454.

<sup>4</sup> *Ib.*, at 455.

<sup>5</sup> (1942) A.C. 691, 707, 708, 710, 712, 713, per Lord Wright; 718, 719, 720, per Lord Porter. *Supra*, 342-347.

<sup>6</sup> (1945), 61 T.L.R., at 456. See *The Leyland Case* [1918] A.C. 350, 362, per Lord Dundelin, *supra*, 319, 320; *The Corwold* [1942] A.C. 691, 702, 708, 707, per Lord Macmillan and Lord Wright, *supra*, 339, 342, 343.

<sup>7</sup> (1944), 60 T.L.R. 549, per Tucker, J.; affirmed (1945), 61 T.L.R. 418, per Scott and du Parcq, L.J.J. (Stable, J., dissenting).



party, of indefinite duration, in the form T 99A, she was proceeding in convoy, from Leith to the Middle East via the Cape, carrying war material, when, on 18th July, 1942, she was torpedoed between the Azores and Spain. The vessel was not navigable and the master thought she could not survive a long tow. The convoy had to proceed and could not take her in tow; enemy submarines were in the vicinity; the master, unable to make wireless calls and to report to the owners, left the ship in charge of the naval officers and took the crew. The officer in command thought that if tugs were sent at once the ship could be salvaged. Orders were given for the despatch of two tugs. On 26th July she was taken in tow; the weather deteriorated, and on 1st August, when she had been towed 400 miles and was within four days of Eire, she suddenly foundered and sank. The suppliants, who had been paid hire until 18th July, claimed £1,267 hire from 19th July to 1st August.

The Crown contended that on 18th July the *Lavington Court* was lost. Clause 25 of the charterparty provided that if the ship be lost, hire should be paid up to and inclusive of the day of loss. Should the vessel become a constructive total loss, such loss should be deemed to have occurred and hire should cease from the day of the casualty. Alternatively, they contended that, on 18th or 19th July the ship became a constructive total loss; alternatively, that the charterparty was dissolved by frustration.

Tucker, J., held that on 18th July there was no "actual total loss" of the ship.<sup>1</sup> The action of the master in leaving the ship and taking the crew did not constitute an "abandonment" of the ship: in all the circumstances he had no alternative.<sup>2</sup> Moreover, although recovery was uncertain, it was not proved to be unlikely. No "constructive total loss" had been established under either subsection of s. 60.<sup>3</sup> The contract itself provided for all contingencies on which hire was to cease: *frustration was inapplicable*.<sup>4</sup> The suppliants were entitled to hire for the period claimed.

On appeal, the decision was upheld by a majority, Scott and du Parcq, L.J.J. (Stable, J., dissenting).<sup>5</sup>

Scott, L.J., said that the master was entitled to treat the naval commander as being under a public duty to take steps for the safety of the ship, the crew and the cargo.<sup>6</sup> The master did not leave the ship "for good and all": he did not abandon all hope of the owners' recovering the ship.<sup>7</sup> He never gave up possession "except in the barest physical sense and that was by enemy compulsion and involuntarily."<sup>8</sup> But even if he did "abandon" the ship, he did not think "a total loss unavoidable": his act did not constitute "a constructive

<sup>1</sup> *Ib.*, at 550. "Where the subject-matter is destroyed, or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereof, there is an actual total loss": Marine Insurance Act, 1906, s. 57 (1).

<sup>2</sup> *Ib.*, at 551. "Subject to any express provision in the policy, there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable . . .": s. 60 (1). See *Richards v. Forestal Land, Timber and Railways Co., Ltd.* [1942] A.C. 50, 83-88, per Lord Wright; *supra*, 356-358.

<sup>3</sup> *Ib.*, at 551. By subs. (2)—which is cumulative and contains a separate definition from the definition in subs. (1)—"In particular, there is a constructive total loss—(1) where the assured is deprived of the possession of his ship or goods by a peril insured against, and (a) it is unlikely that he can recover the ship . . ." See *Robertson v. Petros M. Nomikos, Ltd.* [1939] A.C. 371, 383, 392, per Lord Wright and Lord Porter. The two subsections contain two separate definitions applicable to different conditions of fact.

<sup>4</sup> *Ib.*, at 551. See *French Marine Case* [1921] 2 A.C. 494, 514, 517, 521, per Lord Dunedin and Lord Sumner; *supra*, 601, 604, 605.

<sup>5</sup> (1945), 61 T.L.R. 418.

<sup>6</sup> *Ib.*, at 420.

<sup>7</sup> *Ib.*, at 420. Scott, L.J., quoted and followed *Bradley v. H. Newson, Sons & Co.* [1919] A.C. 16, at 32-35, per Viscount Haldane; at 51-55, per Lord Wrenbury; *supra*, 235.

<sup>8</sup> (1945), 61 T.L.R., at 421.

total loss" within subs. (1) of s. 60. Nor did the facts come within subs. (2): the owner was not "deprived of possession" nor was it "unlikely" that he would recover the ship. No term could be implied, within Lord Sumner's test in *The Bank Line Case*,<sup>1</sup> that in the events which happened, the charterparty was frustrated.

Stable, J., dissented, holding that abandonment was complete "when the master finally and irrevocably left the ship irrespective of whether he intended or contemplated or even knew the legal consequences of his act as between his owners, underwriters, charters or salvors."<sup>2</sup> Abandonment must be *animo delinquendi sine animo revertendi et sine spe recuperandi*. The master abandoned the ship; his decision was reasonable; his action negatives any *animus revertendi*. *Spes recuperandi* is "more than a bare hope that something may turn up": it implies an intention in certain events to take action to recover possession. The total loss of the vessel appeared to be and, in fact, was, "unavoidable."<sup>3</sup> When she was adrift in the Atlantic the ship-owner was "deprived of" possession. That she sank on 1st August was evidence that on 19th July she was a "doomed vessel." On that date she was a constructive total loss and the suppliants were not entitled to hire for the period claimed.

## XI. CONTRACT OF SERVICE : A MISCELLANY

### A. UNDER DEFENCE (GENERAL) REGULATIONS

#### I. DEFENCE (GENERAL) REGULATION 58A (see *supra*, p. 364)

##### 1. *The Control of Employment (Notice of Termination of Employment) (Revocation) Order, 1945*

This order, made on 8th May, 1945,<sup>4</sup> revokes the Control of Employment (Notice of Termination of Employment) Order, 1943.<sup>5</sup>

##### 2. *The Essential Work (Permission to Terminate Employment) (Exemption) Order, 1945*

This order, also made on 8th May, 1945,<sup>6</sup> makes *unnecessary in certain cases* permission of the national service officer to leave or terminate employment.

Where a person—a man over sixty-five or a woman over sixty—

(a) is employed in a scheduled undertaking under the Essential Work (General Provisions) Orders or the Building and Civil Engineering Orders, the Coalmining Industry Order, the Electrical Contracting Industry Orders, or the Shipbuilding Orders, and

(b) is a person to whom the appropriate order applies, that person may leave, or the employer may terminate the employment, without the permission of a national service officer. The *requisite notice*—statutory or contractual—must still be given.

##### 3. *The Control of Engagement Order, 1945*

This order came into force on 4th June, 1945.<sup>7</sup> Its purpose is to provide that, with certain exceptions, *the engagement of men between eighteen and fifty-one and women between eighteen and forty-one shall be made through offices of the Ministry of Labour and National Service, or approved employment agencies.*

<sup>1</sup> [1919] A.C. 435, 454; *supra*, 495, 497

<sup>2</sup> (1945), 61 T.L.R., at 428. Stable, J., appears to follow the dissenting speech of Lord Sumner in *Bradley v. H. Newsom, Sons & Co.* [1919] A.C. 16, 43, 46, 47; *supra*, 256, 257.

<sup>3</sup> 61 T.L.R., at 424.

<sup>4</sup> S.R. & O., 1945, No. 572

<sup>5</sup> S.R. & O., 1943, No. 1178, *supra*, 364, note 1.

<sup>6</sup> S.R. & O., 1945, No. 560.

<sup>7</sup> S.R. & O., 1945, No. 579.

**Art. 1.—Revocation of certain orders**

The following are revoked :—

- The Undertakings (Restriction on Engagement) Order, 1941<sup>1</sup>;*
- The Employment of Women (Control of Engagement) Order, 1943<sup>2</sup>;*
- Arts. 10, 11, 12 of the Essential Work (Shipbuilding and Ship-repairing) (No. 2) Order, 1942<sup>3</sup>;*
- Art. 8 of the Essential Work (Coalmining Industry) Order, 1943.<sup>4</sup>*

**Art. 2.—Interpretation**

The following terms (among others) are defined :—

“ *Child* ” includes a step-child, an illegitimate child and (if the adoption took place before 18th December, 1941) an adopted child (howsoever adopted).

“ *Local office* ” means an Employment Exchange, any Appointments Office of the Ministry, or any other office appointed by the Minister for this order.

“ *Person between the relevant ages* ” means a person who is eighteen, and, if a man, has not attained fifty-one, or, if a woman, has not attained forty-one.

**Art. 3.—Control of Engagement**

Subject to the later provisions of the order—

(a) no person must seek to engage or engage any person otherwise than by notifying a local office or an approved employment agency,<sup>5</sup> of particulars of the vacancy ;

(b) no person must engage any person who has not been submitted to him by a local office or an approved employment agency ;

(c) a person seeking employment must obtain employment by applying to a local office or approved employment agency and by means of a submission to an employer by a local office or an approved employment agency.

**Art. 4.—Provisions as to Re-engagement**

Art. 3 does not apply to a re-engagement which occurs—

(a) just after sickness, if the engagement was terminated through sickness ; or

(b) on resumption of work after a stoppage due to a trade dispute, where a person ceased to be employed through stoppage ; or

(c) within fourteen consecutive days after the day on which a person was last employed by that employer.

**Art. 5.—Excepted Employments**

Art. 3 does not apply to employment—

(a) in agriculture ;

(b) in timber production if the prospective employee is a member of Women's Land Army ;

(c) as fisherman, or master, or member of crew, of a fishing boat governed by Merchant Shipping Acts, 1894–1940 ;

(d) in Women's Services specified in First Schedule (if employment whole-time) ;

(e) if employment part-time, i.e., not more than thirty hours ;

(f) without remuneration ;

(g) in police force ;

(h) in managerial capacity ;

(i) in professional, administrative or executive capacity, except in employments specified in Second Schedule.

<sup>1</sup> S.R. & O., 1941, No. 2089.

<sup>2</sup> S.R. & O., 1943, Nos. 142 and 1278 ; *supra*, 364, note 1.

<sup>3</sup> S.R. & O., 1942, No. 1470.

<sup>4</sup> S.R. & O., 1943, No. 505.

<sup>5</sup> Defined in art 2 (1).

**Art. 6.—Excluded Persons**

Art. 3 does not apply to the engagement or employment of the following persons :—

- (a) persons *between the relevant ages* ;
- (b) a woman who has her child under fourteen living with her ;
- (c) persons *casually employed* otherwise than for the employer's trade or business ;
- (d) persons certified to be registered as *blind* ;
- (e) persons required to transfer or return to employment under reg. 29B ;
- (f) holders of *permit* exempting them from this order ;
- (g) holders of *exemption certificate* exempting them from this order ;
- (h) persons of *unsound mind or persons mentally defective* ;
- (i) *aliens* under restriction from entering employment without consent of Minister.

**Art. 8.—Reinstatement in Civil Employment Act, 1944**

Rights and duties under this Act, remain unprejudiced.

**Art. 9.—Members of Armed Forces, and others**

Art. 3 does not apply to—

- (a) members of *armed forces*, or *women* in services specified in First Schedule, while in receipt of full pay or on leave or temporary release granted on compassionate grounds ;
- (b) persons covered by the *Essential Work (Dock Labour) Orders, 1943–1945*<sup>1</sup> ; *The Essential Work (Trawler Fishing) Order, 1943*<sup>2</sup> ; *The Essential Work (Merchant Navy) Orders, 1942*.<sup>3</sup>

**II. ESSENTIAL WORK (GENERAL PROVISIONS) (No. 2) ORDER, 1942****1. Local Appeal Boards (see *supra*, pp. 373, 374)****(a) Essence of "Evidence"**

In *Moxon v. Minister of Pensions*,<sup>4</sup> an appeal from a Pensions Tribunal which had accepted the advice of its medical member on a medical matter and had accepted as evidence both the reasons given by the Minister of Pensions for his decision and his comments, Tucker, J., said :—

"In my opinion it is impossible, *even when dealing with tribunals which are not bound by the strict rules of evidence*, to hold that statements, whether of fact or expert opinion, contained only in the judgment under appeal, and without any other support, oral or documentary, can be regarded as any evidence of the correctness of such facts or opinions . . ."

Upon the question of the advice of the medical member of the tribunal relating to a matter of medical science, Tucker, J., continued :—

" . . . it is, I think, of the essence of 'evidence' according to English ideas, when used with reference to judicial or quasi-judicial matters, that it should consist of oral statements or documents in writing which are made in the presence of or communicated to both parties when the tribunal reaches its decision. This is not in my view confined to judicial tribunals, bound by legal rules of evidence, but is equally applicable to a quasi-judicial tribunal such as a pensions appeal tribunal which is expressly required to have regard to the *onus of proof* in its adjudications."

<sup>1</sup> S.R. & O., 1943, No. 1114, 1944, No. 1205 ; 1945, No. 29

<sup>2</sup> S.R. & O., 1943, No. 1674.

<sup>3</sup> S.R. & O., 1942, Nos. 1641, 2267.

<sup>4</sup> (1945), 61 T.L.R. 458, 461 ; author's italics. The principles of this case and the next apply equally to *Reinstatement Committees*, *supra*, 387.

(b) *Duty to disclose Relevant Documents*

A quasi-judicial tribunal must not consider documents which are not disclosed to the applicant and which he has no opportunity of answering: *R. v. Architects' Registration Tribunal, ex parte Jaggard*.<sup>1</sup>

A motion for an order of *certiorari* was granted to quash an order of the Tribunal of Appeal under Architects' Registration Act, 1938.

Lewis, J., said:—

"The tribunal had before them, and used, documents which should have been disclosed to the applicant, or which he was entitled to see if the tribunal were going to use them. I am not for one moment suggesting that any of the three members of the tribunal acted in any improper manner in the sense that they did not act *bona fide*. But in my view, they did not do what the authorities referred to say that they should have done, which was to give a real and effective opportunity to the applicant to deal with, or meet, any relevant allegations made in these documents."

The court referred to *R. v. City of Westminster Assessment Committee, ex parte Grosvenor House (Park Lane), Ltd.*<sup>2</sup> where du Parcq, L.J., said that the committee, obtaining a report, must communicate any relevant part of it to persons seeking its guidance.

"An expert witness or adviser, however eminent, is in a very different position [*sc.* from an expert tribunal]. He must not be substituted for the tribunal. Those whose claim is being considered have a right to question and to test every statement he makes, and any opinion he expresses. If that opportunity is denied them, justice is not done."

2. *Suspension without Pay (supra. p. 370)*

Where, before the war, there was in a scheduled undertaking a "well-established and well-recognised practice of suspending workmen for reasons of a disciplinary character," including negligence in the performance of work, the right to suspend is "in accordance with the conditions of his service" within art. 4 (3), and is incorporated in the contract of service: *Marshall v. English Electric Company, Ltd.*<sup>3</sup>

M was an engineer whose contract was liable to be determined by an hour's notice on either side. Suspended for three days without pay, he appealed to the local appeal board; his appeal was dismissed. He then issued a writ for three days' wages and, alternatively, claimed a declaration that suspension was not in accordance with the conditions of his service and was, therefore, not within his employers' rights under the order. In the factory, at Stafford, the employers had always asserted a right to suspend and the workmen had acquiesced in it. Lord Goddard thought that "*suspension*" is

"in truth dismissal, with an intimation that, at the end of so many days, or it may be hours, the man will be re-employed if he chooses to apply for reinstatement."<sup>4</sup>

On the evidence a suspended man could seek employment elsewhere, and need not return to his former employment.

There was an implied term, MacKinnon, L.J., thought, that the employer may suspend for a reasonable time for an act of indiscipline.<sup>5</sup>

In the engineering trade, the practice of suspension was "widespread and notorious."<sup>6</sup> Suspension for not exceeding three days is permitted by the order if it is "in accordance with the conditions of his service." The order does not say: "if it is in accordance with the terms of his

<sup>1</sup> (1945), 61 T.L.R. 445, 447 (Lewis, Oliver and Birckett, JJ.).

<sup>2</sup> [1941] 1 K.B. 58, 68, 69.

<sup>3</sup> (1945), 61 T.L.R. 188, *per* Singleton, J.; affirmed at 379, *per* Lord Goddard, and MacKinnon, L.J. (du Parcq, L.J., dissenting).

<sup>4</sup> *Ib.*, at 880.

<sup>5</sup> *Ib.*, at 881.

<sup>6</sup> *Ib.*, at 881.

contract of employment." Although there may be no contractual right to exercise it, suspension may be exercised in fact.

du Parc, L.J., dissented. A practice to suspend, to which workmen have submitted, is not, of itself "a condition of service." On the facts it amounted to a variation of the contract, *by agreement*: the workman was not bound to obey it.<sup>1</sup>

### 3. *Recognised Holiday* (*supra*, p. 370)

Where, before the war, a *scheduled undertaking had closed for a certain number of days each year for the purpose of annual stocktaking, employing only the persons required for stocktaking*, those days constituted a "recognised holiday" within art. 1 (2). Under art. 4 (4), wages were not payable for those days: *Nolan v. Reiley (Coventry), Ltd.*<sup>2</sup>

The company was an engineering company; the appellant, a capstan lathe hand. The works were closed for annual stocktaking on Saturday, 1st January, and on Monday, 3rd January, 1944. The practice of closing was followed each year from 1938, except in 1940. In the engineering trade there is a general custom entitling workmen to leave on an hour's notice. The judge found that the workers were employed on the footing that the practice would be followed and that no wages would be paid except to those engaged in taking stock.

The common-law contract, said Scott, L.J., is—

"the rough-hewn marble on which the lineaments of the statutory sculpture are carved by the order . . ."

"*Holiday*" is defined in the Oxford Dictionary as—

"A day on which ordinary occupations (of an individual or a community) are suspended; a day of exemption or cessation from work."<sup>3</sup>

Morton, L.J., said that there was both an *agreement* between employers and workmen, and a *practice*. Practice and agreement amounted to "*recognition*" that days of stocktaking were "*holidays*."

### 4. *Termination of Employment* (*supra*, p. 374)

An *alteration in the work of an employee* does not necessarily constitute "*termination*" of his employment, so as to require the written permission of a national service officer: *Andrema, Ltd. v. Jenkinson*.<sup>4</sup>

In April, the N.S.O. refused to permit the company to terminate the employment of H as supervisor of the embossing department. In May, the company appointed another employee as supervisor and instructed H to carry out the work of an embossing operator. She refused, but agreed to work as a checker at the same wages. The company, convicted of terminating the employment of H without the written permission of an N.S.O., appealed.

"Employment," said Humphreys, J., did not denote work "of a particular sort." On the facts, H's "*employment*" was not "*terminated*."<sup>5</sup> There may be circumstances where so great an alteration is made in an employee's position that, in effect, his employment is terminated.

The words mean exactly what they say, said Wrottesley, J.: the company could not, without permission, "*dismiss the woman from their employment*." The order does not forbid *changing an employee's work, or the termination of any particular contract of employment, or moving an employee from one type of job to another, or from one grade to another*.<sup>6</sup>

<sup>1</sup> 61 T.L.R., at 382.

<sup>2</sup> (1945), 61 T.L.R. 401, *per* Scott, Lawrence and Morton, L.JJ (affirming the decision of His Honour Judge Forbes).

<sup>3</sup> *Ib.*, at 401.

<sup>4</sup> *Ib.*, at 500.

<sup>5</sup> Cited *ib.*, at 402.

<sup>6</sup> *Ib.*, at 501.

<sup>6</sup> (1945), 61 T.L.R. 499.

Tucker, J., agreed that, although there may have been the termination of one contract of employment and the creation of a new one, the relationship of employer and employee subsisted.

5. *Reinstatement (supra, p. 524)*

Where employers were directed to reinstate a man who had been dismissed under permission which, as the result of an appeal, has been later cancelled, and, having no vacancy for him as a lorry driver (his long absence from work through accident having made it necessary for them to engage another driver), offered to employ him in their packing store at his former wage, the employers had complied with the direction and the conviction was quashed: *Barr & Stroud, Ltd. v. Adair*.<sup>1</sup>

Lord Moncrieff said:—

“To reinstate” means, in my opinion, to re-employ the dismissed employee in the job from which he was dismissed, or, in any event, in a job with a similar rate of wages and with a like dignity . . .”<sup>2</sup>

He inclined to the view that upon cancellation of permission “the *ex parte* act of dismissal was not valid to interrupt the contract,” although in the present case the point was not material.<sup>3</sup> Even if the service had not been interrupted, under art. 4, the workman has a right to draw the guaranteed wage, subject to two conditions: *first*, he must be capable of and available for work; *secondly*, he must be “willing to perform any services outside his usual occupation which in the circumstances he can reasonably be asked to perform during any period when work is not available for him in his usual occupation in the undertaking.”<sup>4</sup>

“Accordingly,” Lord Moncrieff concluded, “it seems to me that, whether the question arises in the course of an uninterrupted employment, or whether it arises at the critical moment of reinstatement in the old employment, the right of the employee is to be offered his old work again, but subject always to all reasonable adjustments which may be required to meet the circumstances of the case and the requirements of the factory.”<sup>5</sup>

### III. DEFENCE (GENERAL) REGULATION 58AAA

On 9th May, 1945, a Defence (General) Regulation was made “freezing” the Civil Service until further notice.<sup>6</sup>

A person employed in the civil service of the Crown to whom the regulation applies must not, after a prescribed date, terminate his employment except in accordance with prescribed provisions.<sup>7</sup>

The regulation applies to persons employed in the civil service of the Crown employed in the United Kingdom about the business of His Majesty's Government in the United Kingdom, or of the Government of Northern Ireland, except—

- (a) persons who are, or who become, 60;
- (b) persons whose employment, in the opinion of the Minister of Labour and National Service, ordinarily involves not more than 30 hours weekly;
- (c) persons employed in undertakings scheduled under Essential Work Orders;
- (d) persons of such other descriptions as may be prescribed.<sup>8</sup>

The Minister may “prescribe”, and he may provide for “such incidental and supplementary matters as appear to him to be expedient for the purposes of the order.”<sup>9</sup>

<sup>1</sup> [1945] So. (J.) 34.

<sup>2</sup> *Ib.*, at 41.

<sup>3</sup> Paragraph (1).

<sup>4</sup> *Ib.*, at 39.

<sup>5</sup> *Ib.*, at 41, 42.

<sup>6</sup> Paragraph (2).

<sup>7</sup> *Ib.*, at 40.

<sup>8</sup> S. R. & O., 1945, No. 508.

<sup>9</sup> Paragraph (8).

## IV. THE CONTROL OF EMPLOYMENT (CIVIL SERVANTS) ORDER, 1945.

On 21st May, 1945, under reg. 58AAA, the Minister made the above order.<sup>1</sup> From this date, freedom to leave is controlled.<sup>2</sup>

The following are *excepted* from the order: (a) persons employed in Northern Ireland; (b) industrial civil servants; (c) members of the National Fire Service.<sup>3</sup>

Subject as hereafter provided, a "controlled civil servant" who desires to terminate his employment, must, before doing so, obtain *written permission from the permanent head of his department.*<sup>4</sup> "The application should be in writing and should state the grounds."<sup>5</sup> Not later than fourteen days after receipt, the permanent head must *notify* the civil servant that permission is granted or refused, or that the application is under consideration.<sup>6</sup> If no such notification is made; or if notification is sent that the application is under consideration and within one month after receipt, the permanent head does not notify in writing the civil servant that permission is granted or refused, *permission* will be deemed to have been granted immediately after the period of fourteen days, or one month, as the case may be.<sup>7</sup>

Where permission is refused, a civil servant may, within seven days of receipt of refusal (or within such further period as an N.S.O. may for good cause allow), *appeal in writing to an N.S.O.*, setting out the grounds of his appeal. The N.S.O. should consider the appeal and grant or refuse permission so far as is practicable within seven days; or he may, instead of doing so, *submit the matter to a local appeal board.*<sup>8</sup> If the grounds of the appeal are that the civil servant has been *required to transfer to another area and that by reason of distance the transfer would cause him exceptional hardship*, the N.S.O., if satisfied that this would be so, must grant permission.<sup>9</sup>

An *appeal lies to a local appeal board from the grant or refusal of permission.* The civil servant or the permanent head may appeal within seven days of the notification (or such further period as an N.S.O. may, for good cause, allow). The board should make their recommendation within seven days of submission. After considering their recommendation, the N.S.O. may *cancel or grant permission, or direct* any civil servant who has left his employment, to return to it.<sup>10</sup>

Despite permission, *at least seven days' notice in writing (or any longer period required by the terms of his employment)* must be given to the permanent head. The notice may be given *before* permission has been obtained.<sup>11</sup>

## B. REINSTATEMENT IN CIVIL EMPLOYMENT ACT, 1944

I. WHO IS WITHIN THE ACT (*supra*, p. 385)

*The Reinstatement in Civil Employment (Termination of Further Periods of War Service) Order, 1945,*<sup>12</sup> fixes a *limiting date* on which the *war service* of persons, who thereafter perform *whole-time services* under direction or written request of the Minister, shall be treated as at an end. Under s. 12 (2), the whole-time service is treated as if it were a further period of service within s. 6 (1). Under this order, if they receive a written notice that *after a specified date* they will no longer be required to perform the whole-time services, they may exercise their reinstatement rights not later than the fifth Monday after that date.

<sup>1</sup> S.R. & O., 1945, No 561.

<sup>2</sup> Article 2.

<sup>3</sup> Article 3.

<sup>4</sup> Article 4 (1). "Permanent head" includes any person acting on behalf of the permanent head: art. 1 (2).

<sup>5</sup> Article 4 (2).

<sup>6</sup> Article 4 (3).

<sup>7</sup> Article 4 (4).

<sup>8</sup> Article 5 (1), (2).

<sup>9</sup> Article 5 (3).

<sup>10</sup> Article 6.

<sup>11</sup> Article 7.

<sup>12</sup> S.R. & O., 1945, No. 722, made on 21st June, 1945



## II. OBLIGATION TO REINSTATE (*supra*, p. 385)

1. In *George Albert Spacey v. City of London Electric Lighting Co., Ltd.*,<sup>1</sup> the employers argued that they could not reinstate the applicant as a *sub-station attendant* without discharging another employee, and that, without the permission of a national service officer under the Essential Work (General Provisions) Order, 1942, such discharge was illegal. They had applied for permission, which had been refused. Shortly after, street lighting was restored and the employers asked the applicant to begin work. The umpire decided that, although a short delay had occurred, the employers took the applicant back. "at the first opportunity at which it was reasonable and practicable."

2. In *Thomas Edmund Gregory v. Corporation of London Metropolitan Cattle Market*,<sup>2</sup> G had applied to be reinstated as *market constable* in the cattle market at *Islington* where he had been employed from 1925 to 1942. Reinstatement was ordered; the employers appealed. They contended that they had reinstated him on similar terms as a market constable at *Billingsgate* and that they always had the right to transfer their employees. They failed to prove that there was any contractual obligation upon him to submit to transfer, and that it was not reasonable and practicable to reinstate him at *Islington*.<sup>3</sup>

## XII. FRUSTRATION BY WAR

### 1. BILL OF LADING, DESPITE "WAR CLAUSE," FRUSTRATED

Where, on 25th August, 1939, goods had been shipped in a German steamer at Antwerp, *C and F Bombay*, and, on 28th August, a cheque, handed in exchange for the bills of lading, was stopped by the buyers on the ground that, before tender of the bills, the master had received instructions from his government to proceed to a German port (where he arrived on 28th August), the performance of the contract became *illegal*; before tender, the *commercial purpose of the bill of lading was frustrated* and the tender was *invalid*; a *war clause* did not protect the shipowners: *Baxter, Fell & Co., Ltd. v. Galbraith & Grant, Ltd.*<sup>4</sup>

By various contracts (expressly governed by German law), the sellers agreed to sell to the buyers steel rods at prices *C and F Bombay*; cash (subject to rebate), against clean bills of lading. On 20th and 25th August the sellers shipped one-third of the order in the German steamship *Rauenfels* and obtained ten bills of lading (containing a "*war clause*"), seven of which, on 28th August, they tendered to the buyers for the goods shipped under seven of the contracts. The buyers then handed the sellers a cheque for £4,705 and, in exchange, received the shipping documents. On the same day they told the sellers that their bankers had declined to make advances against the documents and that they were stopping the cheque. The sellers, by agreement (and without prejudice), handed the cheque back in exchange for the documents. The buyers waived formal tender of bills of lading covering the remaining three parcels. The sellers claimed the price of the shipments or, alternatively, damages.

It was contended for the buyers that the tender was invalid: under German law it was illegal for the shipowners to perform the contracts of carriage: under German and English law the commercial adventure was frustrated. The sellers argued that the obligations of the ship-

<sup>1</sup> Case No. 22 (1945).

<sup>2</sup> Case No. 23 (1945).

<sup>3</sup> The umpire distinguished *Donald Edward Smith v. Bucks County Education Committee* (Case No. 10), where the liability to transfer was a recognised incident of the occupation of *temporary school attendance officers*. An employer's "primary obligation" was to reinstate a man in his former "occupation," "not necessarily to give him the identical employment."

<sup>4</sup> (1941), 70 Ll. L. Rep. 142. See, upon the order of the German Government, *Richards v. Forestral Land, Timber & Railways Co., Ltd.* [1942] A.C. 50, 79, 80, per Lord Wright; *supra*, 850.

owners were subject to a war clause. The deviation to Bremen was precautionary. From 20th to 25th August the risk was upon the buyers.

The arbitrator, Sir Robert Aske, K.C., found that the orders of the German Government were binding on the master. Between the German and the English law of frustration there was no material difference. Under English law, performance was not frustrated. Subject to the opinion of the court, he awarded that the buyers were liable to pay the price of the seven shipments (less rebates), and damages for rejecting the documents in respect of the other three shipments.

Frustration, said Atkinson, J., is a *question of law* to be decided by the court upon the facts. The commercial purpose of the contract was to secure some reasonable probability of the delivery in Bombay within a reasonable time of 25th August, the first date for this shipment. On or about that date the German Government had given their instructions to the master. For three days, performance of the contract in the bill of lading had been illegal: at any moment war might break out.<sup>1</sup>

A bill of lading must be valid and effective at the date of tender.<sup>2</sup> When does a bill of lading cease to be "effective"?

"Supervening illegality of performance causing delay of indefinite duration, but probably of such length that the service contemplated will never be performed, operates to frustrate a contract."

In this case, on 28th August, "on the true facts and on the probabilities to be drawn from those true facts," the contract had "become killed."<sup>4</sup> From the *true facts*—had they been known at the time—only one conclusion was possible: war had become inevitable. The contracts of affreightment had ceased to exist.

Was this result affected by the *war clause*?<sup>5</sup> Frustration does not depend upon a clause, but upon events and their operation upon a contract. Under this war clause, there was to be no liability for damages for certain things done in pursuance of government order; that was not inconsistent with a provision that, if the commercial purpose of the contract were frustrated, the contract was ended.

## 2. DETENTION OF BRITISH SUBJECT: CONTRACT OF SERVICE DISSOLVED (*supra*, p. 516)

Where in May, 1940, the Borough Engineer of Guildford, a British subject, was *detained* under Defence Reg. 18B, and in June, 1940, the council resolved that (subject to the approval of the Minister of Transport) his appointment be deemed to have terminated as from the date of his detention, the contract was frustrated and no further salary accrued: *Knight v. Borough of Guildford*.<sup>6</sup>

In December, 1940, K was released from detention and claimed damages for wrongful dismissal or three months' salary in lieu of notice and the return of his contributions to the superannuation fund. The corporation pleaded frustration. Alternatively, they pleaded that they were justified in summarily dismissing him because

<sup>1</sup> *Ib.*, at 148, citing *The Comptoir Case* [1920] 1 K.B. 868, 890, *per* Bankes, L.J., *supra*, 550.

<sup>2</sup> *Ib.*, at 149, citing *Arnhold Karberg & Co. v. Blythe, Green, Jourdain & Co.* [1916] 1 K.B. 495, 506, 509, 514, *per* Swinfen, Eady, Bankes and Warrington, L.J.J., (*supra*, 264), and *per* Atkin, J. in *Groom (C.), Ltd. v. Barber* [1915] 1 K.B. 316, 324, *supra*, 267.

<sup>3</sup> (1945), 70 Ll. L. Rep., at 150. At 157 Atkinson, J., gives a valuable description of *frustration*. (Cited *supra*, 406, note 2)

<sup>4</sup> *Ib.*, at 157.

<sup>5</sup> *Set out, ib.*, at 145.

<sup>6</sup> (1942), 194 L.T. 30. Allen, *Law and Orders* (1945), Appendix 6, 343-352, quotes in full that part of the judgment dealing with the evidence of alleged disloyalty.

he had not been "a loyal citizen," and that by such disloyalty he had committed "misconduct" in the performance of his duties.

Hilbery, J., rejected the evidence of disloyalty. He found that the contract was frustrated. K was entitled to recover his contributions.

### XIII. THE CRICKLEWOOD CASE (See *supra*, p. 568)

This decision is now reported in the *August* issue of the *Law Reports*: [1945] A.C. 221-245.

*Viscount Simon*, L.C.'s definition of frustration is at page 228. His discussion of the question *whether frustration may apply to a lease* is at pp. 229-231.

The analysis by *Lord Russell of Killowen* of the case against that proposition is at pp. 233-234.

*Lord Wright's* reading upon Frustration is at pp. 237-241. At p. 237 are his observations upon *Paradine v. Jane*<sup>1</sup> and upon *Lord Sumner's* "pithy description of the doctrine of frustration" in *The Hirji Mulji Case*.<sup>2</sup> He discusses, at p. 239, the cases where covenants in a lease may be terminated by operation of law. If the contract is dissolved under the express terms of the lease, the estate in land falls with it; why may not this also be true if the lease is dissolved by operation of law? (at p. 240). His example of the frustration of a building lease is at p. 241.

*Lord Porter's* indication that, in any event, conditions in which frustration would apply to a lease are "not easy to visualise," is at p. 242.

*Lord Goddard's* exposition of the "strange and unjust" results that would follow, if frustration applies to a lease, is at p. 245.

### XIV. NO FRUSTRATION: AN AUSTRALIAN CASE

#### 1. FRUSTRATION OF LEASE: AUSTRALIAN DICTUM (*supra*, p. 580)

In *Firth v. Halloran*<sup>3</sup>—where the decision followed *Mattley v. Curling*<sup>4</sup>—*Isaacs, J.* (in the High Court of Australia), observed, *obiter* :—

"I do not agree that, because the contractual obligation relied on by the plaintiff is created by an instrument of lease, the doctrine of frustration is necessarily excluded. The nature of the relation of landlord and tenant, the history of the doctrine of frustration, its inherent meaning and the judicial determination of relevant cases would lead me to reject so sweeping a rule. Nor do I think the consequences of terminating the relation of landlord and tenant any more extraordinary than that of terminating any other legal relation which by hypothesis is expressly or impliedly created on a mutual and fundamental basis of existence or continuance which fails at a given point. In a matter resting on covenant it is 'the contract . . . and not the estate . . . which is the determining factor': *Hallen v. Spaeth*."<sup>5</sup>

#### 2. HIRING OF NEON ADVERTISING SIGNS

Where, during the currency of the hiring under certain contracts for the construction, installation and hiring of *neon advertising signs*, orders were made under the *National Security Act, 1939-1940 (Australia)*, prohibiting the illumination of the signs, the contracts were not frustrated and the hirers continued liable for rent: *Scanlans New Neon, Ltd. v. Tooheys, Ltd.*; *Caldwell v. Neon Electric Signs, Ltd.*<sup>6</sup>

<sup>1</sup> (1647), *Alayn* 26; *supra*, 458, 459.

<sup>2</sup> (1926) 38 C.L.R. 261 at 269.

<sup>3</sup> (1923) A.C. 684, 690.

<sup>4</sup> [1926] A.C. 497, 510; *supra*, 506.

<sup>5</sup> [1922] 2 A.C. 180; *supra*, 552-555.

<sup>6</sup> [1943] 67 C.L.R. 169 (High Court of Australia. On Appeal from the Supreme Courts of New South Wales and of Victoria), per Latham, C.J., McTiernan and Williams, JJ.

This case is notable for an important judgment of Latham, C.J.,<sup>1</sup> who reviews the English decisions and examines microscopically the various theories of frustration.<sup>1</sup>

(a) *The Facts*

*Scanlans' Case.*<sup>2</sup> The contracts were made from 1937 to 1941. On 19th January, 1942, neon lighting was indefinitely prohibited—*whether by day or night*—by order of the Premier of New South Wales under powers conferred by the Commonwealth. The contracts were made *before Japan entered the war* and all (except four) before the outbreak of the present war. The contracts were entitled "*Lease and Service Agreements*"; the parties were called lessor and lessee; in substance the signs were let out to hire for use upon the terms of the contract. Scanlans agreed to construct and instal the signs which would become the hirer's property, but upon the termination of the hiring Scanlans could remove them. The initial term of each contract was *sixty months*, with an *option* for an additional twenty-four months. Rental was payable (except as provided) *whether the sign should be used or operated by the lessee or not*. The parties plainly expected that the sign would be illuminated. The hirers agreed to pay for electrical energy used and to be responsible for the supply of current. On default, Scanlans could by notice repossess the signs and accelerate payment of future hire or claim damages. Each contract contained this term:

"It is understood and agreed that the sign is especially constructed for the lessee and for use only at the premises above designated and that it is a material consideration to the lessor in entering into this agreement that the lessee shall continue to use the sign *as contemplated*."

An express term excluded any agreement or representation not written in the contract.

The trial judge found, *inter alia*, that the signs had a value for daylight—sometimes substantial—as well as night-time, advertising. Since the prohibition order, the hirers had lost the benefit of night advertising but had the benefit of advertising during the day. The cost of erection exceeded 50 per cent. of the total rental. Night advertising was the most important—and the essential—benefit contemplated. Neither party was prevented by the prohibition from performing any essential promise. The contracts had not been frustrated. By a majority the Full Court of the Supreme Court reversed this decision. Scanlans appealed to the High Court of Australia.

*Caldwell's Case.*<sup>4</sup> Neon Signs sued C, the assignee of an hotel in Melbourne, for rent due. In February, 1940, the assignor had agreed to hire for five years two electrical advertising signs. As from 12th December, 1941, illumination was prohibited by order. In February, 1942, the order was modified and illumination *by day* became lawful. The contract was in the same form as the *Scanlans* contract, save that instead of the corresponding clause the following clause appeared:—

"It is agreed between the parties that the said sign is being especially constructed for the hirer and for use only at the premises of the hirer and it is a material consideration for the owner entering into this agreement that the hirer shall continue to use the sign on his premises."<sup>5</sup>

<sup>1</sup> [1943] 67 C.L.R., at 186 *et seq.*

<sup>2</sup> *Ib.*, at 170, 173.

<sup>3</sup> Author's italics. Contrast clause in *Caldwell's Case* *infra*.

<sup>4</sup> *Ib.*, at 178, 174.

<sup>5</sup> Author's italics. Contrast corresponding clause in *Scanlans' Case*, *supra*.

The magistrate made an order in favour of Neon Signs. An order to review the decision on the ground of frustration and absence of jurisdiction was discharged by the Supreme Court of Victoria. By special leave the defendant appealed to the High Court.

The appeals were heard together.

(b) *The Arguments*

*Scanlans*<sup>1</sup> relied upon *Herne Bay Steam Boat Co. v. Hutton*<sup>2</sup> and *The Leiston Case*.<sup>3</sup> There was no implied term that upon a frustrating event the loss should be wholly borne by one or the other of the parties. The Neon companies had performed the major part of their obligations. Lord Wright's observations in *The Fibrosa Case*<sup>4</sup>, upon the implication of what is "fair and reasonable", are not binding.

It was argued for Neon Signs (in the second case) that the mere deprivation of an advantage does not amount to frustration.<sup>5</sup> The common object, or an express term, must be frustrated. The hirers could have applied for exemption from the order; there was no absolute prohibition of lighting. *The lessor would not have foregone the whole cost of installation merely because the lessee's user was restricted.* The transaction, described as a lease, is really a bailment; the bailee acquires a legal interest—"a special right of property"—in the sign. He has received substantial benefit—apart from the value of the sign for daylight advertising. Only the enjoyment of the sign, not the legal interest, had been affected.

The hirers contended that once "an essential benefit" has been lost by either party, the court will hold—unless the contract has made express provision for that event—that the contract is at an end.<sup>6</sup> That the frustrating event was, or might have been, "contemplated" does not prevent "frustration." *The Leiston Case*<sup>7</sup> was wrongly decided. The use of the sign "as contemplated"—i.e., as "an illuminated sign"—was "the common adventure"; it had been prevented by the war regulations.

(c) *The Case: Apart from Frustration*

Apart from the question of frustration, said Latham, C.J., the case was a simple one. The lessor did not promise that the sign would be illuminated; his duty was to provide a sign capable of being illuminated. The lessee did not obtain any warranty of "illuminability."

There was no "mistake" affecting the subject-matter. *Disappointment or failure to receive an expected benefit*, is not "mistake." There was no impossibility of performance. Each party had received a substantial part of the consideration: *no total failure of consideration* had supervened.<sup>8</sup> The orders did not make performance of the contracts illegal. According to the terms of the contract the lessees were liable. It was contended, however, that since the lessees would not receive "the degree of benefit" which both parties expected them to receive—"an essential benefit,"—the contracts were at an end.

(d) *Lord Wright's Theory of Frustration Criticised.*

The doctrine of frustration is "difficult to state."<sup>9</sup> According to Lord Sumner, in *The Bank Line Case*,<sup>10</sup> the terms used in the various cases might be arranged under nine headings—some of which depend upon quite distinct principles.<sup>11</sup> Latham, C.J., proceeds to examine the three theories discussed by Sir A. D. McNair.<sup>12</sup> Lord Wright's

<sup>1</sup> [1943] 67 C.L.R., at 174, 175.

<sup>2</sup> [1916] 2 K.B. 428; *supra*, 541.

<sup>3</sup> [1943] 67 C.L.R., at 175-178.

<sup>4</sup> [1916] 2 K.B. 428; *supra*, 541.

<sup>5</sup> *Id.*, at 180.

<sup>6</sup> [1948] 67 C.L.R., at 180

<sup>7</sup> *Frustration of Contract by War* (1940), 56 L.Q.R. 173; *supra*, 423-427

<sup>8</sup> [1903] 2 K.B. 683; *supra*, 472.

<sup>9</sup> [1943] A.C. 32, 70; *supra*, 412, 648.

<sup>10</sup> [1943] 67 C.L.R., at 178-182.

<sup>11</sup> [1943] 67 C.L.R., at 185.

<sup>12</sup> [1919] A.C. 467, 458; *supra*, 495, 499

theory that "the court in the absence of express intention of the parties determines what is just,"<sup>1</sup> would introduce much uncertainty into the realm of contractual obligations.

Even if such a principle were applied, since, in this case, the lessors had provided the whole consideration and the lessees had received substantial consideration, it was not "just and reasonable" that they should be freed from the obligation to pay rentals. Some adjustment might be fair and was possible under regulations.<sup>2</sup>

(e) *Theory of Disappearance of Foundation*

Upon the theory of disappearance of the foundation of the contract—which "reached its full development in *Krell v. Henry*"<sup>3</sup>—Latham, C.J. (who analyses the reasoning most minutely and incisively)<sup>4</sup> observes:—

"If a man buys or hires a motor car, both parties know that he expects to be able to drive it. The stoppage of the sale of petrol, which would make it impossible for him to drive it, does not excuse him from his obligation to pay the purchase-money or the hire for the agreed period."<sup>5</sup>

The general rule is that a man who promises must perform or pay damages: he cannot excuse himself by relying on circumstances *de ors* the contract to show that he did not mean what he said or because the contract has not worked out as one or both of the parties expected.<sup>6</sup> What did Vaughan Williams mean by "*the substance of the contract*"? Is it a *basis* of the contract, or is it "imported into the contract as one of its terms"? Upon one view, the contract was *subject to a condition* that unless a certain event occurred, the parties were to be released from further obligation. Upon the other view, a provision is introduced, by inference, into the contract that the duty to pay was conditional upon a procession taking place. Upon the one view, the contract has ceased to exist; upon the other, the contract has not been discharged, but there is no breach.<sup>7</sup>

If, in the present cases, the "*basis of the contract*" theory were applied, there is no evidence which takes the court beyond the terms of the contracts. The parties expected the signs to be used as *illuminated* signs, but *they agreed that rent was to be paid whether the signs were used or not*. "The court, therefore, would not be justified in holding that the basis of the contract was that no rent should be paid if the signs were not used."<sup>8</sup> The lessees promised, in absolute terms, to pay rent. The lessors *did not warrant* illumination. Both parties *assumed* illumination, but an assumption unincorporated in a contract and relating only to "uncovenanted benefits," does not affect the obligations of the parties.<sup>9</sup>

(f) *Theory of "Implied Term"*

The doctrine of the "*implied term*" can be distinguished only with difficulty, from the "*basis or substratum theory*." In many of the frustration cases, one of the parties would never have made the contract if he had thought that, upon the happening of a particular event, he would be left to bear the loss, alone.<sup>10</sup>

Lord Sumner, in *The Haji Mulji Case*,<sup>11</sup> stated an "objective test": frustration is "irrespective of the individuals concerned, their temperaments and failings, their interest and circumstances."

<sup>1</sup> *Legal Essays and Addresses*, 258, *supra*, 408

<sup>2</sup> *National Security (Contracts Adjustment) Regulations* (Statutory Rules, 1942, No 65),

<sup>3</sup> [1903] 2 K.B. 740, 749, *supra*, 467

<sup>4</sup> [1943] 67 C.L.R. 190-194

<sup>5</sup> [1943] 67 C.L.R., at 191

<sup>6</sup> *Ib.*, at 191, 192

<sup>7</sup> *Ib.*, at 193, 194.

<sup>8</sup> *Ib.*, at 194.

<sup>9</sup> *Ib.*, at 195

<sup>10</sup> [1936] A.C. 497, 510, *supra*, 506, 508.

Latham, C.J., courageously criticises this criterion. It involves, he says, the creation of a "legal man" corresponding to the "economic man" of nineteenth century economists.

"The legal man," he continues, "is an individual without any relevant temperaments or failings, without any relevant interests, and apparently not surrounded by any relevant circumstances. He is different from the business man of *Bowen*, L.J.,<sup>1</sup> and from the reasonable man of whom we hear so much in the law of negligence. Those men are persons who can readily be assumed to exist. A court which applies the 'objective' test is confronted with the difficult problem of implying a term upon the basis that each of the parties is the same sort of legal man, and, while ignoring their interests, determining what is 'fair and reasonable, having regard to the mutual interests concerned.' I have difficulty in forming the conception of a legal man by abstracting him from his interests and then determining what such a legal man would be likely to do, having regard to his interests."<sup>2</sup>

It is difficult to specify the "common object"<sup>3</sup> of the parties, as distinct from the "individual advantages." Contracting parties are not partners:

"They are engaged in a common venture only in a popular sense. They do not share profits or losses. There is no one particular thing to be selected from the various objects of the parties which can be fairly described as the common object of both parties. Each party expects certain individual advantages from the performance of the contract. The person who agrees to sell goods expects to deliver the goods and to get the price. The man who expects to buy them expects to get the goods and to pay the price. The acquisition of the goods is no more and no less a common object than the receipt of the price."<sup>4</sup>

The idea of a contract as a "common venture" comes from charter-party cases—which have peculiar characteristics.<sup>5</sup> In an ordinary contract there is no common object other than

"the sum total of the individual advantages which the parties hope to obtain by virtue of the performance of the contract on both sides."<sup>6</sup>

But the "common object" does not determine the contractual obligations: it is to be determined after they have been ascertained.

In the present cases, the object of one party was to get a neon sign installed and kept in working order; the object of the other was to obtain payment by way of rental. "There was nothing which can be said to be the common object or adventure of the parties."<sup>7</sup> The lessees, therefore, could not rely upon "frustration of a common adventure."

If, however, a term is to be implied and the court is to speculate what term the parties would probably have agreed upon to meet the limitation or prohibition of illumination, a neon company would be most unlikely to agree "to commit commercial suicide" to deprive itself of all rent if illumination were limited or prohibited.<sup>8</sup> If, on the other hand, the court is not allowed to speculate, "one is remitted to the doctrine of the legal man who appears to be devoid of all human qualities."<sup>9</sup> Even "such a hypothetical person" would not have exposed himself, after incurring considerable expense, to the loss of all rentals.<sup>10</sup>

"In the present cases there is no difficulty whatever in holding that a person wanting a neon sign, dealing with a company supplying

<sup>1</sup> In *The Moorcock* (1889), 14 P.D. 64.

<sup>2</sup> Per Lord Sumner, in *The Hírji Mulf Case* [1926] A.C. 497, 507, *supra*, 508.

<sup>3</sup> [1943] 67 C.L.R., at 196.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*, at 197.

<sup>6</sup> *Id.*, at 197, 198.

such signs, could have seen the risk of war or of lighting restrictions and yet (in order to get the sign) have agreed to a five-year contract under which he would pay rent throughout, notwithstanding the restrictions."<sup>1</sup>

(g) *Rule in Paradine v. Jane: Still the Law*

The rule laid down by McCardie, J., in *The Blackburn Bobbin Case*<sup>2</sup> applied: "an undertaking absolute in form should be construed according to its words, and not as being subject to any unexpressed conditions relating to events which may unexpectedly happen in the future."<sup>3</sup> Latham, C.J., continues:—

"... it is much safer, when parties have chosen to contract in absolute terms, to hold them to the terms of their contract. If they desire the contract to be conditional, they can readily so provide in express terms."<sup>4</sup>

A lady goes to a dressmaker and orders a wedding dress, telling the dressmaker it is for her wedding to X. The dress is made; without the lady's "default," the wedding goes off. She must pay, even though the wearing of the dress at the wedding was "an essential benefit manifestly contemplated by both parties as obtainable by the lady as the result of the performance of the dressmaker's promise."<sup>5</sup>

Latham, C.J., cites and follows the rule of frustration, stated by Russell, J. (as he then was), in *The Badische Case*.<sup>6</sup> He referred to *The Leiston Case*,<sup>7</sup> *The Egham Case*,<sup>8</sup> and *The Walton, Harvey Case*.<sup>9</sup>

If the contracts created an interest in land, the defendants' position would be still more difficult: *Matthey v. Curling*.<sup>10</sup>

(h) *A Criticism*

Since *The Leiston Case*<sup>11</sup> has been gravely doubted,<sup>12</sup> the present decision does not seem to be a strong authority.

Apart, however, from the decision, the reasoning of Latham, C.J., it is submitted with great respect, in the light of the latest authorities on frustration, cannot be supported.

Lord Wright does not regard the contract as clay in the hands of the court: on the facts as found and interpreted, frustration must be ineluctable. Lord Sumner's "legal man"—as Latham, C.J., describes him—is, of course, not an abstraction, but very real, to judge by the speeches in *The Bank Line Case*<sup>13</sup> and *The Hirji Mulji Case*.<sup>14</sup> In a contract, it is submitted, a "common object" can be found, even though, examined minutely, it may appear to be the aggregate of individual advantages. The unqualified statement in *Paradine v. Jane*<sup>15</sup> can no longer be regarded as the law.<sup>16</sup> That an absolute undertaking is necessarily absolute, is no longer law. The case of the wedding dress may be compared with the case of the cricket match<sup>17</sup>:

<sup>1</sup> [1943] 67 C.L.R., at 198.

<sup>2</sup> [1918] 2 K.B. 543, *supra*, 545, 547.

<sup>3</sup> [1943] 67 C.L.R., at 198.

<sup>4</sup> *Ib.*, at 200.

<sup>5</sup> *Ib.*, at 201.

<sup>6</sup> [1921] 2 Ch., at 379; *supra*, 500, 502.

<sup>7</sup> [1916] 2 K.B. 428; *supra*, 541-543.

<sup>8</sup> (1942), 2 All E.R. 164; (1944), 1 All E.R. 107 *supra*, 516-518.

<sup>9</sup> [1931] 1 Ch. 145, 274; *supra*, 555-557.

<sup>10</sup> [1922] 2 A.C. 180; *supra*, 552-555. Cited at 202 of [1943] 67 C.L.R. Upon this aspect of the case, see *per Williams, J.*, *ib.*, at 232.

<sup>11</sup> [1916] 2 K.B. 428; *supra*, 541-543.

<sup>12</sup> In *The Denny Mott Case* [1944] 265, 271, *per Viscount Simon, L.C.*, *per Lord Wright* at 280. and *per Lord Porter*, at 282.

<sup>13</sup> [1919] A.C. 435, 454, 455, 459, 460; *supra*, 495-499.

<sup>14</sup> [1926] A.C. 497, 509, 610; *supra*, 506-509. <sup>15</sup> (1647), Aleyn 26; *supra*, 458, 459.

<sup>16</sup> See *per Lord Wright* in *The Cricklewood Case* [1945] A.C. 221, 237; *supra*, 557.

<sup>17</sup> *Per Viscount Simon, L.C.*, in *The Fibrosa Case* [1943] A.C. 82, 43; *supra*, 633.



"by proper implication" the contract, in each instance, is for an "out and out" payment.

#### XV. FIBROSA: A CANADIAN CASE (*Supra*, p. 627)

In *Robbins v. Wilson & Cabellu, Ltd.*<sup>1</sup> the *Fibrosa* decision<sup>2</sup> was recently applied by the Court of Appeal for British Columbia.

In November, 1941, R signed a contract, selling his motor car to the company: they were to hold the price, \$332.29, to his credit towards the purchase of a new car to be bought by him from the company within five years. This figure was arrived at by deducting from the normal price, \$725.00, an amount, \$392.71, which R owed on it to a finance company. The contract concluded:—

"I further expressly agree that I shall not be entitled to any repayment of the same, or any part thereof, at any time or under any circumstances whatsoever; it being the true intent of this agreement that such a sum shall remain and be a perpetual credit to which I shall be entitled only if, as, and when, I purchase such new car from you as above mentioned."

When R applied to the company for a new car, he was informed that he would require a permit from the motor vehicle controller. His application for a permit refused, he sued for \$332.29. Shandley, C.C.J., awarded him that sum, holding that the contract was frustrated, that there was a total failure of consideration and that the *Fibrosa* principle applied. The Court of Appeal of British Columbia (by a majority) reversed this decision. The whole court found that the contract was frustrated, but the majority held that the special language of the contract precluded R from recovering.<sup>3</sup>

The decision has been severely criticised on the following lines:<sup>4</sup>

In the first place, Robertson, J.A., based frustration upon the *implied term*. But in November, 1941, the parties must have known that the sale of motor cars might be restricted. In February, 1941, an Order in Council had empowered the controller to make regulations: in March, 1942, he made an order restricting purchases. The theory of the implied term did not fit the facts. Lord Porter's reasoning in *The Constantine Case* was the true principle: some contracts are *absolute*—the promisor "*warrants the possibility of performance*"; in other cases, "*the promisor is only obliged to perform if he can.*"<sup>5</sup>

*Secondly*, the judges took it for granted that the contract was frustrated. Could it not be argued that a "mere interruption" had occurred: R might have obtained a permit later, or the controller might have withdrawn his order. R had five years in which to buy his new car; when the controller imposed his restriction, only five months had elapsed.

*Thirdly*, despite the absolute nature of the words "under any circumstances whatever," the language is not absolute in effect and does not include frustration. O'Halloran J.A., who dissented, thought that, construed in the light of the purpose of the agreement, the language meant one thing only: *only while the contract remained in existence* would the money be retained as a credit.

Another writer thinks that the *Fibrosa* principle does not apply: the failure of consideration was *partial*.<sup>6</sup> On the facts, however, it has been well pointed out, \$332.29 was the *price*—the true value of R's interest—for which, according to the contract, the car was sold.<sup>7</sup>

<sup>1</sup> [1944] 3 W.W.R. 255 (Shandley, County Court Judge): reversed by a majority, *per* Robertson, J.A. (O'Halloran, J.A. dissenting) 625. The author's summary of the case is based upon two Notes in (1945), 23 Can. Bar Rev. 165-167 (D. M. Gordon), and 253-262 (Raphael Tuck).

<sup>2</sup> [1943] A.C. 32.

<sup>3</sup> (1945), 23 Can. Bar Rev. 256, 257.

<sup>4</sup> In particular, by Mr. Raphael Tuck, *ib.*, 257 *et seq.*

<sup>5</sup> [1942] A.C. 203, 204; *supra*, 523, 529.

<sup>6</sup> Mr. D. M. Gordon: 23 Can. Bar Rev. 165.

<sup>7</sup> By Mr. Raphael Tuck; *ib.*, at 261, 262.

## XVI. INTERNATIONAL LAW ASSOCIATION

## EFFECT OF WAR ON CONTRACTS : SUGGESTED RULES

## I. HISTORY OF PROPOSALS

At the Madrid Conference of the International Law Association in 1913, Sir Leslie Scott, K.C. (as he then was), read a Paper on "The Effect of War on Contracts" (reprinted in (1913), 30 L.Q.R. 77-90), and Dr. A. Sieveking, a Dutch jurist, read a Paper on "The Influence of War on Private Contracts." A committee was formed to frame rules upon the influence of war on contracts, but the war of 1914 prevented it from becoming effective.

At the 35th Conference held at Warsaw in 1928, Dr. Sieveking presented Draft Rules on *Effect of War on Contracts*.<sup>1</sup>

A committee was accordingly appointed to examine the whole subject. Mr. R. E. L. Vaughan Williams, K.C., was the chairman, and the committee included A. D. McNair, G. Pallciaz, Amos J. Peaslee, A. Sieveking, D. B. Somervell, K.C., and Everard Dickson.

At the 36th Conference held at New York in 1930, the committee presented an *Interim Report*.<sup>2</sup> *Sixteen Suggested Rules* relating to the effect of war on contracts generally, were passed by the Conference.

At the 37th Conference held at Oxford in 1932, the committee proposed *Five further Rules* relating to the effect of war on *Insurance* and to other matters. The Rules, as amended, were passed.<sup>3</sup>

A convention, it was hoped, would ensue, but the Rules were never adopted. They would "involve legislation producing a profound change in our law."<sup>4</sup> They remain, nevertheless, of great importance—those, in particular, upon *Insurance*—and may be of value to those drafting a Treaty of Peace. They will, no doubt, form the basis of future discussions among lawyers in their endeavour to regulate the legal effects of war.

The *International Chamber of Commerce*, at its Washington Congress held in 1930, passed a Resolution upon the *Protection of Private Property in Time of War and in Time of Peace*.

"The security of private property on land, on sea and in the air should be guaranteed both in time of peace and in time of war. The principle of inviolability should extend to all private material rights, including debts, participations and the protection of intellectual and industrial property."<sup>5</sup>

This was before the era of the barbarities of "total war."

And this, also, a Resolution of the Stockholm Conference of the International Law Association of 1924 :

"... that the revived practice of warring States by which they confiscate the available private property of alien citizens is a relic of barbarism worthy of the most severe condemnation."<sup>6</sup>

The intention of the International Law Association was to combine the work of the various committees on the effect of war on enemy property and contracts, and on neutral property and contracts and to put to the Conference "*one combined set of rules on the influence of war on commerce*." This adopted, was to be laid before Governments : "It would be a benefit for the commercial world if this all-important, controversial and vexed subject could be uniformly settled in a

<sup>1</sup> Report of the Thirty-fifth Conference, Warsaw, 1928. For proceedings, see 258-265. The Draft Rules and Special Rules are at 343-397.

<sup>2</sup> Report of the Thirty-sixth Conference, New York, 1932. *Interim Report containing Suggested Rules* 1-19, at 69-71; *Debate*, 71-100; *Report as Amended and Passed by Conference*, 100-118. The relevant Papers are at 505-516, including *Letter with Annexes, from British Insurance Association*, 512-526.

<sup>3</sup> Report of the Thirty-seventh Conference, Oxford, 1932. *Rules on Effect of War on Contracts* (Rules 1 to 23), at 80-103; *Debate* 103-121.

<sup>4</sup> Dr. A. D. McNair, *ib.*, 110

<sup>5</sup> *ib.*, 247, 248.

<sup>6</sup> *ib.*, at 248.

Convention signed and ratified by the most important nations of the world."<sup>1</sup> A committee, appointed in 1930, presented a report in 1932 (which, however, remained for discussion), in the form of *Seven Draft Rules for Proposed Convention: "Rights and Duties of a Belligerent with regard to Enemy Private Property in Time of War."*<sup>2</sup>

## II. UNDERLYING PRINCIPLES

The committee considered that the effect of war on contracts existing between persons residing or carrying on business in the territories of different States should be "certainly known": an effort should be made to secure "uniform principles." (II.)<sup>3</sup>

Even a *harsh rule was preferable to no rule*: certainty upon the legal effect of war on contracts was "in the interest of the civilised community throughout the world." (III.)

The committee's recommendations began with "the general proposition that the effect of war should be to dissolve all contracts, subject to specified exceptions, in preference to stating that the effect of war should not be to dissolve contracts, except in certain cases in which there should be dissolution." (IV.)<sup>4</sup>

In determining the exceptions, the committee were *guided by the Treaty of Versailles*, and the cognate treaties; certain additions were made, e.g., Rules 7, 8 and 10. (V.)

Contrary to the committee's proposals, an *organisation* should be set up in each belligerent country *for the collection of debts due from nationals and for the discharge, to a like extent, of the obligations of debtors.* (VII.)<sup>5</sup>

The committee's recommendations took the form of *Suggested Rules.* (VIII.)

These Rules are set out, *verbatim*, below.

The *alphabetical* notes were appended to the Draft Rules by the committee; the *numbered* notes are the author's.

## III. SUGGESTED RULES

### A.—General Proposition

1. On the outbreak of war contracts between persons<sup>(a)</sup> of whatever nationalities residing<sup>(a)</sup> in the territories of opposing belligerent Powers should be treated as dissolved, subject to the exceptions and/or special Rules with regard to particular contracts and/or classes of contracts contained in this Report.<sup>6</sup>

(a) In these Rules the word "persons" includes physical persons, partnerships, companies, and associations which are juridical entities.

The term "residing" is intended to cover various circumstances, many of which are impossible to foresee. We are therefore of opinion that the meaning should not be confined to the limited interpretation which would result from an attempt at definition.

### *Persons altering Residence during War*

2.—(a) Contracts between persons of whatever nationalities who, on the outbreak of war, are residing in the territory of the same belligerent Power, should be treated as dissolved, subject to the

<sup>1</sup> *Ib.*, at 245

<sup>2</sup> Text, *ib.*, at 245, 246.

<sup>3</sup> Report of 1930 Conference, 109-111

<sup>4</sup> For discussion, see *ib.*, 71-82

<sup>5</sup> This was the Dutch proposal, rejected by the committee: *ib.*, 82-94.

<sup>6</sup> See discussion, 36th Report, 1930, at 94 *et seq.* The principle of dissolution was not extended to enemy occupied territory.

After the word "residing" in Rules 1, 2(a) and 2(b), the original rule read "and/or carrying on business". To meet the objection made by the Dutch Branch, the words were deleted by the drafting committee and Rule 2 (c) was added: *ib.*, 96-99.

For the suggestions of the American Branch upon Rules 1-6, see 1928 Report, 424-426.

exceptions and/or special Rules referred to in Rule 1, above, if and when one of the parties thereto, in the course of war, voluntarily becomes resident in the territory of an opposing belligerent Power.

### *Neutrals*

<sup>1</sup> (b) Subject to the provisions of para. (c) hereof, contracts between persons of whatever nationalities who, on the outbreak of war, are not within the scope of either of the preceding Rules should be treated as dissolved, subject to the exceptions and/or special Rules referred to in Rule 1. above, if and when two or more of the parties thereto in the course of the war voluntarily become resident in the territories of opposing belligerent Powers.

(c) As to persons respectively not resident in the territories of opposing belligerent Powers, but resident in the territory or territories of a neutral Power or Powers, a contract to which such persons are parties should be dissolved if such contract involves intercourse between persons residing in the territories of opposing belligerent Powers.

### *Branch Officers and Agents*

3. The dissolution of a contract under Rule 1 or Rule 2 should take effect notwithstanding that such contract may be capable of execution by or with agents or branch offices without reference to principals or head offices residing in the territories of opposing belligerent Powers.<sup>1</sup>

### *War-time Contracts*

4. Contracts made during war between persons to whom Rules 1 and 2 apply should be void and of no effect, but nothing in this Report should be deemed to propose to invalidate a transaction lawfully carried out during the war with the authority, express or implied, of the belligerent Powers.

### *Pre-war Debts*

5.—(a) Whenever under a contract within Rule 1 or Rule 2 a debt or other pecuniary obligation which arises out of any act done or money paid under the contract has become due before the times specified by the said Rules, such contract should continue in force in so far as may be sufficient to enable the party to whom such debt or pecuniary obligation may be due to recover the same in due course.

### *Pre-war Breaches of Contract*

(b) Whenever as a result of the failure of one of the parties to a contract within Rule 1 or Rule 2 to perform its stipulations a right of action has accrued to another party before the times specified by the said Rules, such contract should continue in force in so far as may be sufficient to enable an action to be maintained for the breach thereof in due course.

### *Saved from Dissolution*

6. The following classes of contracts concluded before the times prescribed by Rules 1 and 2 should remain in force subject to the provisions of such contracts :—

- (a) Contracts for the transfer of immovables when before the times prescribed by the said Rules the property according to the *lex loci rei sitae* has passed.<sup>2</sup>
- (b) Contracts for the letting of immovables.

<sup>1</sup> See Japanese amendment, which was withdrawn : " Nothing in these Rules should affect the validity of contracts which have been made in contemplation of war," instancing contracts of guarantee by neutrals to complete contracts which have become void as between the principals. Dr. Burgin pointed out that when the principal was discharged, these Rules would also discharge the subsidiary contract of guarantee (1930 Report, at 100).

<sup>2</sup> But the entry in the Land Registry has not taken place : see discussion

- (c) Contracts of mortgage, pledge, or lien, provided that the sale during the war of a security held for a person residing in the territory of an opposing belligerent Power should be deemed to have been valid irrespective of notice to the owner if the creditor acted in good faith and with reasonable care and prudence and in accordance with the *lex fori*, and no claim by the debtor on the ground of such sale should be admitted.<sup>1</sup>
- (d) Contracts regarding the exploitation or development of mines,<sup>2</sup> minerals, mineral rights, forests, or lands.
- (e) Contracts constituting companies or other legal entities separate from that of the persons of whom they are composed.
- (f) Concessions or other public utility contracts between individuals or companies on the one hand, and States, provinces, municipalities, or other public authorities on the other.<sup>3</sup>
- (g) Contracts relating to family relations and or status.<sup>4</sup>
- (h) Contracts relating to gifts *inter vivos* or *mortis causa* or bounties to individuals or involving the settlement in successive interests of movables or immovables.

In so far as there may be in any testamentary instrument an element of contract, nothing in these Rules should be deemed to render such testamentary instrument or any contract in connection therewith invalid.<sup>5</sup>

### *Suspension*

7. Any obligation remaining in force by virtue of these Rules, notwithstanding the provisions of Rules 1 and 2, should be suspended during the war if and so long as the performance of such obligation requires intercourse between persons residing in the territories of opposing belligerent Powers, and the opposing belligerent Powers have not expressly or impliedly authorised such intercourse: Provided that no such obligation should become enforceable by reason only of any transfer to a third party.<sup>6</sup>

### *Mandataire*

8.—(a) Whenever upon the outbreak of war a person of whatever nationality residing in the territory of one belligerent Power is in possession or control of the movables and/or immovables and/or rights and/or rights of action of a person residing in the territory of an opposing belligerent Power, the former person should (subject to the terms of any contract between them which is maintained under these Rules or otherwise notwithstanding the outbreak of war) have the right and be under the duty to take all reasonable steps required for preserving such property and minimising its loss or damage. All such steps reasonably and *bona fide* taken should be deemed to be valid, and the party taking them should be indemnified by the owner of such property at the conclusion of the war.<sup>7</sup>

(b) The dissolution under Rules 1 and 2 of a contract of agency should not discharge the obligation of the agent to account to his principal.

<sup>1</sup> See *ib.*, at 101, 102.

<sup>2</sup> See *ib.*, at 102. Much money has normally been sunk: "There is a sort of element of permanence. Nobody would sink a mine unless he had plenty of time to get the minerals out."

<sup>3</sup> Following Art. 73 (f) of the Treaty of Lausanne: *ib.*, at 102.

<sup>4</sup> For example, marriage or adoption. "Family relations" was added because in France a contract of marriage relates not to family status, but to family relationship: *ib.*, 102, 103.

<sup>5</sup> This clause was added *ex abundanti cautela*: *ib.*, at 103.

<sup>6</sup> That is, in neutral territory: *ib.*, at 103, 104.

<sup>7</sup> See *ib.*, at 104, 105.

*Prescription. Periods of Limitation*

9. For the duration of the war, and a period of at least three months after its conclusion, all periods of prescription and limitation should be suspended as between persons to whom these Rules apply.<sup>1</sup>

*Partly performed Contracts*

10.—(a) *Money Payments before the war.*—Whenever under a contract which is treated as dissolved by the operation of Rule 1 or Rule 2, one party has before the time specified by the said Rules paid to another party the whole or any part of the money consideration under the contract, the former party should be entitled to recover from the latter party after the war the sums so paid, subject to any claim the other party may have under sub-paragraph (b) hereof, and provided that the other party should be entitled to set-off in total or partial extinction of the claim any loss which he may ultimately have incurred by reason of acts reasonably done by him in pursuance of such contract.<sup>2</sup>

(b) *Performance of obligations other than money payments before the war.*—Whenever under a contract which is treated as dissolved by the operation of Rule 1 or Rule 2, one party has before the time specified by the said Rules performed obligations other than money payments under the contract, of which the other party has received the benefit, but for which the money consideration has not become due within Rule 5 hereof, the former party should have the right to recover from the other party after the war the value of the said benefit giving credit for the consideration, if any, he may have received from the other party therefor.<sup>(b)</sup>

(b) *Rules 10 (a) and 10 (b).*—The principle of the above Rules is to confer a *prima facie* claim on a contracting party, who by a money payment, or otherwise, has conferred a benefit before the war on the other contracting party, the latter party being liable for the benefit he has received or its value. In assessing the benefit, the party against whom the claim is made is entitled to deduct the losses, if any, incurred under, and by reason of, the contract. In partially-executed contracts dissolved by war, there will in many cases be a loss. Expenses may have been incurred or services rendered which, owing to the dissolution of the contract, bring no, or no adequate, return. The effect of the Rules is to place this loss on the claimants—i.e., the party who is seeking to disturb the *status quo*. This seems to us to be most in accord with general legal principles. It would theoretically be possible to treat the contracting parties to such a contract as partners and divide any such loss between them in equal shares. Though there may be something to be said for this in theory, it is, so far as we know, a principle which has never been adopted with regard to contracts dissolved by *force majeure* or other similar causes, and we can only refer to it to demonstrate the necessity of placing such loss on one party or the other.

*Occupied Territory*

11. Contracts between persons of whatever nationalities, one or more of whom may reside<sup>3</sup> in the territory of a belligerent Power which in the course of the war is occupied by the armed forces of an opposing belligerent Power, should be suspended during the period of occupation, and the legal effect of such suspension should be determined by the local law in force in the territory in question on the cessation of occupation.<sup>4</sup>

<sup>1</sup> See *ib.* at 105. "Prescription" refers to "lost rights"; "periods of limitation" include rights gained.

<sup>2</sup> The Limitation (Enemies and War Prisoners) Act, 1945, suspends these periods while a party was an enemy or was detained as a prisoner of war, and for twelve months thereafter: *supra*, 714.

<sup>3</sup> The Law Reform (Frustrated Contracts) Act, 1943, meets the point of clause 10. See *ib.* at 105, 106.

<sup>4</sup> The words "and/or carry on business" were excised from the Draft: *ib.*, 107.

<sup>5</sup> This is not the view of English law which has regard to the realities of enemy-occupied territory: *The Seaford Case* [1943] A.C. 303, *supra*, 96.

*Negotiable Instruments*

12.—(a) Obligations arising from a negotiable instrument\* (promissory note, bill of exchange, cheque, or similar negotiable instrument) which has been made, drawn, accepted, endorsed, or delivered before the times prescribed by Rules 1 and 2 should continue in force, and as between persons to whom Rules 1 and 2 apply, no negotiable instrument should be deemed to have become invalid by reason only of failure within the required time to present the instrument for acceptance or payment or to give notice of non-acceptance or non-payment to drawers or endorsers or to protect the instrument, nor by reason of failure to complete any formality during the war or for a period of three months thereafter.<sup>(c)</sup>

(b) No person to whom Rule 1 or Rule 2 applies should become liable during the war upon a negotiable instrument which at the outbreak of war or subsequently in the course of the war was in the hands of a holder to whom Rule 1 or Rule 2 also applies by reason of making, drawing, acceptance, endorsement, or delivery during the war.

(c) If a person to whom Rule 1 or Rule 2 applies has either before or during the war become liable upon a negotiable instrument in accordance with an undertaking given to him by a person who subsequently on the outbreak of war or otherwise was or became resident in the territory of an opposing belligerent Power, the latter should remain liable to indemnify the former in respect of his liability notwithstanding the provisions of Rules 1 and 2.<sup>1</sup>

(c) In the following examples A and B are residents respectively in opposing belligerent States. N is a neutral:—

*Rules 7 and 12 (a).*—(1) N before the war becomes holder for value of a bill drawn by A and accepted by B, maturing after the war. N's rights are unaffected and he can present the bill and claim payment at maturity.

(2) A becomes holder before the war of a bill of which B is acceptor, which falls due during the war. A cannot enforce payment during the war, but he retains his rights and can present for payment after the war. In so far as formalities such as presentation, protest, etc., are necessary to charge the acceptor or other parties liable, A has a period of three months after the war in which these can be validly performed.

*Rule 12 (b).*—A becomes holder before the war of a bill of which B is acceptor, which falls due during the war. A can negotiate the bill within the country in which he is resident. He can also negotiate to a neutral, but the neutral cannot enforce any claim against B until after the war. In other words, the neutral gets no greater rights as against B than A had.

*Partnerships*

13. The rights and liabilities of partners, whether persons or individual persons to whom Rules 1 and 2 apply, should be adjusted in accordance with the terms of the partnership agreement and the local law applicable.

*Companies*

14. In so far as the rights of shareholders of limited companies may be held to depend upon contracts, nothing in these Rules should be deemed to dissolve such contracts.<sup>(d)</sup><sup>2</sup>

(d) The position of enemy shareholders and companies, is, in our opinion, sufficiently protected by the provisions of Rule 8 (*Mandataire*), and the constitution of the company, in the ultimate resort, must usually determine its position in time of war.

<sup>1</sup> The Rule was drafted after consultation with a large bank doing large international business.

<sup>2</sup> See, however, *The Dalmier Case* [1916] 2 A.C. 307, and *supra*, 120 *et seq.*

*Severability*

15. Whenever a contract provides in part for obligations which remain in force by virtue of these Rules, notwithstanding the provisions of Rules 1 and 2, and in part for obligations which are dissolved by virtue of Rules 1 and 2, the former obligations should continue in force if they are severable, but if they are not severable the contract should be deemed to be dissolved in the entirety.

*Definition of outbreak of war*

16. For the purpose of these Rules, the expression "the outbreak of war" should include :—

- (a) the formal declaration of one or other of the belligerent Powers, or
- (b) in the absence of such formal declaration the date of the outbreak of actual hostilities, or
- (c) in the absence of such actual hostilities the date as from which it is declared by the Government of the State of one of the parties to the contract that trading or commercial intercourse with persons residing in the territory of the State of another party to the contract is unlawful or forbidden.<sup>1</sup>

*B.—Insurance<sup>2</sup>**Application of Rule 1*

17. Contracts of insurance which would be dissolved by the application of Rule 1 should be exempted from the application of that rule to the extent set out in the following paragraphs :—

*1.—Marine Insurances of any Subject-matter**(a) Voyage Insurances*

In the case of insurances of cargo, these should remain valid and in force in accordance with their terms if the risk has attached at the outbreak of war.

In the case of insurances of vessels, these should remain valid and in force in accordance with their terms if the risk has attached at the outbreak of war until the termination of the voyage or for a period of one month after the outbreak of war, whichever period shall be the shorter, and should, on the completion of the said voyage or period, be dissolved.

If the risk has not attached such contracts should be dissolved.

<sup>1</sup> This definition was proposed by Dr. Burgin : *ib.*, at 108, 109

<sup>2</sup> The committee received great assistance from Mr. A. D. McNair and Mr. D. B. Somervell, K.C. (as they then were) : 37th Report, 1932, 104. The present proposals, said the Chairman, were not supported by the British Insurance Association (*ib.*).

The Institute of London Underwriters were not in favour of any draft set of rules : they were in favour of the broad principles laid down in that section of the Treaty of Versailles relating to marine insurance, modified on the questions of interest and limitation (1930 Report, 514).

The committee's proposals involved the *maintenance of insurance contracts (other than those of life insurance) for one month only* from the outbreak of war, this being "a short convenient period to enable an insured person to obtain insurance cover elsewhere" (37th Report, 1932, 105). *Contracts of life insurance*, the committee thought, *should be kept alive*. This view was not unanimously held by those with whom the committee had been in communication. The American view was that in so far as a contract of life insurance provides for future premiums and corresponding benefits it should be cancelled, but that the position of the parties should be adjusted more favourably to the insured than would be represented by the bare surrender value on the date of cancellation (*ib.*). The *Scottish Life Offices* favoured *cancellation*. They adopted the American view as laid down by *New York Life Insurance Co. v. Statham* (1876), 93 U.S. 24. They regarded the Treaty of Versailles as inequitable to insurance companies and suggested a clause to the effect that contracts of life insurance with an enemy existing at the outbreak of war were *cancelled* as at that date, subject to the liability of the office to pay the value of the policy at date of cancellation, *without prejudice* to (a) right of parties to *arrange for revival*, on terms to be agreed, and (b) right of office to make *ex gratia* payment in respect of a policy which is not revived (36th Report, 1930, 521). The *English Life Offices* favoured *maintenance* of such contracts, *subject to payment of premiums when due*, and they proposed the establishment of a neutral institution (*ib.*, 36th Report, 1930, 517). In the main the committee adopted the lines laid down in the various treaties (37th Report, 1932, 105).



**(b) Time Insurances**

These should remain valid and in force in accordance with their terms, in respect of any voyage which has begun prior to the outbreak of war until the termination of that voyage, or for a period of one month after the outbreak of war, whichever period shall be the shorter, and should on the completion of the said voyage or period be dissolved.

If the voyage has not begun such contracts should be dissolved.<sup>1</sup>

**(c) Floating Insurances**

These should remain valid and in force in accordance with their terms if the risk has attached at the outbreak of war, provided that the declaration on the policy has been made before the outbreak of war.

If the voyage or transit has not begun, (dd) such contracts should be dissolved.

(dd) The words in italics were replaced by "If the risk has not attached," p. 113, post. This was the only alteration made by the Conference.

**2.—Fire, Theft, Accident, and other Insurances**

(a) These should remain valid and in force in accordance with their terms for a period of one month after the outbreak of war, and should on the completion of that period be dissolved.(e)

(b) Contracts of insurance other than those dealt with expressly in these rules should be covered by the preceding sub-paragraph.

(e) The treaties following upon the European War (1914-1918) maintained these insurances until the annual premiums became payable for the first time after the expiration of three months from the coming into force of the treaty applicable. A special committee of the British Insurance Association appointed to deal with the matter recommended that these contracts should remain in force, provided—

(1) The risk had attached.

(2) The premiums had been paid by the assured, and the other conditions complied with by him. (Thirty-sixth Report, p. 576.)

Your committee have, nevertheless, thought that these contracts should be dissolved (after a period of one month's grace). They have done this on the following grounds:—

(1) That unless there is an arrangement for the payment of losses through a neutral body, parties assured could not get their money in reasonable time.

(2) That the establishment of the fact of the loss, average adjustment, and the determination of the sums due under the policy are matters which could not, in any circumstances, be settled without direct communication. In the case of life assurance the occurrence of the event which renders the sum assured payable does not call for the same difficult inquiries, and local investigation is less essential.

(3) That business transactions between enemies are undesirable and contrary to the general rule adopted by most States.

**3.—Belligerent Action**

No contract of insurance remaining valid and in force in accordance with paras. 1 and 2 hereof should be deemed to cover losses due to belligerent action by the Power of which the insurer is a national, or in the territory of which he resides, or by the allies or associates of such Power.(f)

(f) An interesting point of domestic law arises as to whether it should be legal at a time when war is not contemplated for an insurer in country A to insure an owner in country B against war risks, including the risk of damage by the armed forces of A in the event of war between A and B. At present this is illegal by English law. The result of its illegality is that an owner can only get a full cover against war risks from an insurer of his own nation. Insurers take different views as to what the law should be on this matter.

<sup>1</sup> The International Union of Marine Underwriters, in 1931, approved this first Rule.

#### 4.—*New Contract*

Whenever a person who had before the war entered into a contract of insurance which falls within the provisions of para. 1 or 2 hereof, has after the outbreak of war and within the period for which the contract remains valid and in force by virtue of one of the said paragraphs, entered into a new contract covering the same risk with an insurer, who is not resident in the territory of an opposing belligerent Power, the new contract should be deemed to be substituted for the original contract as from the date when it was entered into, and the premiums payable should be adjusted on the basis of the original insured having remained liable on the contract only up till the time when the new contract was entered into.

#### 5.—*Life Insurance (g)*

(a) These should remain valid and in force in accordance with their terms and subject to the provisions of paras. 7 and 8 hereof.<sup>1</sup>

(b) Contracts should be considered as contracts of life insurance for the purpose of these Rules, when they depend on the probabilities of human life, combined with the rate of interest for the calculation of the reciprocal engagements between the parties.

(g) It has been proposed in some quarters—e.g., Scottish Life Offices Association (International Law Association, Thirty-sixth Report, p. 518), that a contract of life insurance should be abrogated by the outbreak of war as against its surrender value. Your committee feel that the surrender value of an existing policy, even if increased beyond the normal surrender value, may not represent its full value to the assured. The assured's life may have deteriorated. He may be uninsurable and yet have rights under a life policy taken out—e.g., two years earlier—when he was a good life. These considerations have led the committee to propose the maintenance of contracts of life insurance. On the other hand, the committee has had to consider the importance, from the point of view of insurer, of the regular payment of premiums during the currency of the policy. In this connection see note to para. 7.

#### 6.—*Reinsurances*

(a) Contracts of reinsurance and treaties of reinsurance should remain valid and in force in accordance with their terms for a period of one month after the outbreak of war, and should on the completion of that period be dissolved.

(b) On the dissolution of the contract of reinsurance or a treaty of reinsurance under the preceding sub-paragraph, subject to any provisions which there may be in the contract (which provisions should, if there be any, prevail) there should be an adjustment of accounts between the parties, and in default of agreement between the parties as to the accounting for unearned premiums, credit should be given for the *pro rata* return of premium (less commission), in respect of premiums paid or payable for any period after the dissolution of the contract or treaty.<sup>(h)</sup>

(A) This is an adaptation of certain proposals of a committee of the British Insurance Association.

<sup>1</sup> The application of this Rule, it was pointed out, might, in a long war, ruin a life insurance company whose business was done essentially with residents in a foreign country (37th Report, at 107). Swedish insurers accepted, in the main, the British view as set forth by Mr. Trounce. He suggested that the Rules apply only where an arrangement had been made to pay premiums to or through a neutral body (*ib.*, at 108, 109); otherwise the insurance should be adjusted against its surrender value (*ib.* at 109). Another speaker cited from *New York Life Insurance Co. v. Mackay* (1876), 63 U.S. 24, 82, *supra* 279, to show that a revival of life insurance policies after war might be detrimental to the insurance offices (*ib.* at 117).

### 7.—*Payment under Insurance Contracts*

Subject to the provisions of Rule 7, payments falling due under contracts of insurance, whether accrued before the war, or, in accordance with these Rules, during the war, should be suspended until the termination of the war unless arrangements are made with the assent of the belligerent Powers concerned given either before or during the war for the payment of premiums and/or losses to or through a neutral body.<sup>(4)</sup>

(4) A memorandum prepared for the British Insurance Association by Mr. Trouncer will be found on p. 523 of the Thirty-sixth Report. Recommendations coming from such a source obviously deserve to be treated with great respect and should be carefully considered. The English Life Offices Association has expressed the view that contracts of life assurance should not be abrogated subject to the payment of premiums to some "neutral body," and the opinion has been expressed elsewhere (see, e.g., M. Bosschard's Paper—p. 543, Thirty-sixth Report) that some such neutral fiduciary body might intervene. Proposals were also made by the Dutch Branch of the International Law Association for the establishment of machinery for the settlement of all private debts during war. These were not adopted by the committee, but were in part accepted by the Conference of the International Law Association at New York in September, 1930.

The following are Mr. Trouncer's suggestions:—

(1) That an International Bureau should be set up under the supervision of the League of Nations either at Geneva, The Hague, or some other place nominated by the League.

(2) This International Bureau should consist of representatives from life offices in each of the belligerent countries of such a standing that they would be able to communicate freely with the offices in their own country.

(3) The setting up of some International Court or Tribunal who must have authority to arbitrate on questions of title and other details.

(4) That every life office in the belligerent countries must send to the Bureau a list of the policies held, the premiums on which are paid by residents in the enemy country.

(5) That a national of one belligerent country who pays the premium, or who desires to pay the premium, on a policy in a life office of another belligerent country may serve a notice on the Bureau that he desires to pay the premium on such policy, or may nominate some person who will pay the premium on his behalf. Notice must also be given to the Bureau by the legal owner of the policy, who will generally be the person who pays the premium, that he agrees to the conditions under which the Bureau is set up, and agrees to be subject to the jurisdiction of the International Court.

(6) Renewal notices would be sent by the life office to the Bureau, who would in turn advise the assured. The Bureau, in notifying the assured of the amount required to renew the policy, would advise the assured the amount required on that day in the country of the Bureau equivalent to the amount required by the life office in its currency at the rate of exchange for the day.

(7) The essential part of this scheme is the opportunity to the assured to pay the premiums required to the Bureau, but there would appear to be no reason why the Bureau should not, out of moneys in hand, pay claims, annuities or discharge other obligations that are approved by the International Court. Such payments should be made in or on the basis of the currency of the country of the Bureau, the claim being translated into that currency at the rate of exchange on the day that the claim is admitted to have arisen.

(8) Rules would have to be formed governing the investment of moneys by the Bureau and the rate of interest to be allowed on payments which have been authorised by the International Court and not paid.

(9) The question of the expenses of the Bureau could be dealt with by adding a percentage to premiums and deducting a percentage from premiums.

8.—*Formalities*

No insurance claim should be defeated by reason only of a failure during the war to give notice or to do any other act under the contract where such failure is attributable to the existence of a state of war.

9.—*Risks not attached*

When a premium or premiums have been paid prior to the war, wholly or in part, in respect of risks which under these Rules do not attach, and in respect of which the insurer is never under any liability, the insurer should become liable to repay to the assured such amount as is properly attributable to such risks.

10.—*Deposits*

Whenever according to law such sums deposited by foreign insurers carry interest or dividends, such interest or dividends should be returned to the insurer on the termination of the war, provided they are not necessary for maintaining the amount of deposit required.

*Application of Rule 2*

18. The provisions of Rule 2(k) should apply to contracts of marine insurance, contracts of fire, theft, accident, and other such insurances, and to contracts and treaties of reinsurance, but should not apply to contracts of life insurance. Contracts of life insurance should remain valid and in force in accordance with their terms and subject, where applicable, to the provisions of Rule 17, paras. 5, 7, and 8.

(k) The circumstances envisaged by Rule 2, when parties have become enemies with knowledge of the situation and consequences, do not, in the opinion of the committee, render it either necessary or desirable that there should in the case of marine or casualty insurance or reinsurance be any exception to the general rule of dissolution. On the other hand, life insurance involves considerations of a different character, and for this reason has been made an exception.

*Industrial, Literary and Artistic Property<sup>(1)</sup>*

19. (a) Assignments of and licences to use rights of industrial, literary and artistic property, which would otherwise be dissolved under these Rules, should remain valid and in force.

(b) Where a right of user of industrial, literary or artistic property is part of and/or incidental to a contract or group of contracts which would be dissolved under these Rules, the said contract or contracts should be dissolved, but such right of user should be preserved, and the party having such right should be entitled to exercise the same during the war, subject to payment after the war of such sum as should be determined after the war as due and proper consideration for such user.

(2) Your committee has had the advantage of a valuable communication from the Industrial Property Committee (formerly the Trade Marks Committee) on the subject of this Rule, and para. 2 has been amended to follow the proposals of that committee.

*Transfers to Neutrals<sup>(m)</sup>*

20. No transfer or assignment during the war of an obligation or a benefit arising from a contract falling within the scope of these Rules to a person or persons residing in the territory or territories of a neutral Power or Powers should be effective to remove the said contract from the operation of the said Rules.<sup>1</sup>

(m) See also Rule 7 and the footnote to Rule 12.

<sup>1</sup> The German delegate thought that there was nothing wrong in people assigning their contracts to neutrals who would then enforce them (*ib.*, at 119, 120).

*No Compensation*

21. Whenever by virtue of these Rules a contract is dissolved or suspended, no person should be entitled to compensation for damage or injury resulting from such dissolution or suspension.

*Interest*

22. Interest on any sum due, whether subject to suspension or not, should be payable by the debtor at the rate, if any, stated in the contract. If no rate is stated in the contract the rate of 5 per cent. per annum simple interest should apply.

*Computation of Time*

23. For the purpose of these Rules the period of one month should be deemed to mean a period of one calendar month, to commence on the date of the outbreak of war at midnight, according to the time (e.g. West European, Mid-European summer or winter time) prevailing in the most western of the countries concerned. Other periods of time are to be similarly determined.

(Signed) ROLAND F. LOMAX VAUGHAN WILLIAMS  
(Chairman)

EVERARD DICKSON

(Hon. Secretary).

December, 1931.

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